

uxori dilectissimae

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Opinions expressed herein are strictly personal, not necessarily reflecting views of the University of São Paulo or any other institution.

Abbreviations most frequently used

Institutions and institutional Devices

ACP	Afrique, Caraïbes, Pacifique (countries associated with the E.C.: IV Lomé Convention, 15 December 1989)
ALADI	Latin American Association for Development and Integration (Treaty of Montevideo of 12 August 1980)
ALALC	Latin American Free Trade Association (Treaty of Montevideo of 18 February 1960)
Andean Pact	Acuerdo de Cartagena (Treaty of Bogotá of 26 May 1969)
CJI	Comité de Juristas Interamericanos
EC	European Community
ECJ	European Court of Justice
ICJ	International Court of Justice
ILAM	Instituto Latino-Americano (S. Paulo)
MERCOSUL	Common Market of the Southern Cone (Treaty of Asunción of 26 March 1991)
OAS	Organisation of American States

Periodicals and Publications

AFDI	Annuaire Français de Droit International
AJCL	American Journal of Comp. Law
AJIL	American Journal of Int'l. Law
BILA	Boletim de Integração Latino-Americana (Brasília, Ministry for Foreign Affairs)
CDE	Cahiers de droit européen
CJFE	Cahiers jur. et fisc. de l'exportation
CMLRev	Common Market Law Review

ELR	European Law Review
Fordham Int'l. LJ	Fordham International Law Journal
For.Aff.	Foreign Affairs
Gedächt. CONSTAN- TINESCO	Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für L.-J. CONSTANTINESCO (Hrsg. G. RESS, G. LÜKE u. M.R. WILL, Cologne, Heyman, 1983)
JOCE	Journal Officiel C.E.
JWT	Journal of World Trade
ICLQ	Int'l. & Comparative Law Quarterly
Misc. HECKE	Miscellanea Georges A. van HECKE (Antwerpen, Kluwer, 1985)
Misc. MEERSCH	Miscellanea Walter J. GANSHOF van der MEERSCH (Bruxelles, Bruylant, 3 vols., 1972)
Pol.Ext.	Política Externa
RCADI	Recueil des Cours (Académie de Droit International, The Hague)
RCDIP	Revue critique de droit international privé
RDM	Revista de Direito Mercantil, Industrial, Econômico e Financeiro
RGDIP	Revue Générale de Droit International Public
RIL	Revista de Informação Legislativa
RIW	Recht der Internationalen Wirtschaft
RMC	Revue du Marché Commun
RTDE	Revue trim. de droit européen
SJZ	Schweizer Juristen Zeitung
30 Years	Trinta anos de direito comunitário (EC Comission, Luxembourg, SPOCE, 1984)
VRBEI	Vorträge, Reden u. Berichte (Europa-Institut der Universität des Saarlandes, Saarbrücken)
WuR	Wirtschaft und Recht
YEL	Yearbook of European Law

Other Abbreviations

art.	Article
BIICL	British Institute Int'l. & Comp. Law
BPDS	Brasília Protocol for Dispute Settlement (MERCOSUL/Brasília, 17 December 1991)
CCFB	French-Brazilian Chambers of Commerce (São Paulo and Rio de Janeiro)
CFCE	Centre Français du Commerce Extérieur
CUP	Cambridge University Press
et al.	"et alius" or "et alii" (and other(s))
EUI	European University Institute (Florence)
EUT	European Union Treaty (Maastricht, 7 February 1992)
FCE	Fondo de Cultura Economica (México)
Festschr.	Festschrift für (...)
ff.	(and) following
GATT	General Agreement on Tariffs and Trade
Gedächtn.	Gedächtnisschrift für (...)
i.a.	"inter alia" (among other(s))
i.e.	"id est" (that is)
IEE-ULB	Inst. d'Études européennes (Univ. Libre de Bruxelles)
Misc.	Miscellanea (...) (Collected Papers)
OUP	Oxford University Press
n/d	date not stated
pb	paperback
Reg.	Regulation
RIIA	Royal Institute of Int'l. Affairs

SEA	Single European Act (Luxembourg & the Hague, 17 and 28 February 1986)
SPOCE	Serviço de Publicações Oficiais das C.E. (Luxemburgo)
UP	(...) University Press

Notes to the Text

- Dates are stated according to ICJ practice;
- Reference to E.C. "Member-states", hyphenated and without a capital "s" reflects terminology of the European Union Treaty; MERCOSUL Member States are referred to as "Member States"
- Names of authors (or main author, followed **et al.**) and date of publication (or copyright date, if exact publ. date is not given) are stated in capital letters in the text, followed by note number for additional references and/or comments, e.g.: (SCHLESINGER, 1945) ⁽¹³⁾. Such device is also used to separate different works of the same author;
- Books are quoted in normal type, following name of author; articles and papers are listed inside "quotation marks", also following name of author.

1. Introductory Remarks

To cultivate the appropriate intellectual atmosphere among us today, I suggest we adopt the Socratic method, along the line of Platonic scholarship (F. M. CORNFORD, 1932; C. RITTER, 1933; R. L. NETTLESHIP, 1933; W. JAEGER, 1936; R.H.S. CROSSMAN, 1937; A. LESKY, 1957/58; O. GIGON, 1961; W. K. C. GUTHRIE, 1969; A. J. FESTUGIERE, 1971, 1975) ⁽¹⁾, more of a dialogue with open-ended conclusions than a formal academic lecture.

This reveals both my method and my expectations in today's attempt to address a "comparative approach to competition law in the E.C. and the MERCOSUL": I do not intend to make a fully formulated and 'closed' presentation - but will necessarily rely on your active 'homologeis', or in the vernacular, "joint-thinking", if it may be so expressed, on the subject matter hereof, referring to Wolfgang SCHADEWALT (1950/72) ⁽²⁾.

Paraphrasing Alfred EINSTEIN (*Größe in der Musik*, 1941) ⁽³⁾, this lecture has come to be written just after the completion of an extensive and purely scientific work, which thanks to its extraordinary proportions, has not yet achieved publication (CASELLA, 1993) ⁽⁴⁾:

"The writing of the present volume, requiring no long preliminary research, no copious scientific equipment, and no learned annotations was, so to speak, a recreation. It is not long; but it may be pertinent to remember that a French writer once apologized for the great length of one of his books by saying that 'he hadn't the time to be brief'. True, this one was written in a short time, but it is nevertheless the result of considerable experience and long preoccupation with the great masters. In a few of its sections it takes the form of variations on thoughts already recorded by the author in his critical effusions. Its general stimulus came from the chapter on historical greatness in Jacob BURCKHARDT's *Weltgeschichtliche Betrachtungen*, a book to be recommended to all who are humanistically inclined as especially elevating in times of moral and intellectual upheaval or atrophy.

"The author has spoken as freely and critically of the great masters of music as though they were still living and subjects of dispute. Some people may resent this. (...) No one is to be deprived of these pastimes. But it is hoped that, never-

theless, some readers may feel that the compelling motives in writing this book were reverence, gratitude and love"⁽⁵⁾).

I also wish this lecture could flow as freely as the essay by Alfred EINSTEIN, from which the quotation above was made.

Owing to the impossibility of covering the entire universe of economic integration law, the field which seems most apt for comparison, for many reasons as will be discussed further in this lecture, is "competition law". One such reason, paradoxical though it may seem, is because of the impossibility of making an adequate comparison in this field, due to the lack of parameters for such an exercise (CASELLA, 1992 & 1993) ⁽⁶⁾.

If my proposal is to compare things incomparable, we shall face not only an "aporia", but a full "contradictio in terminis" as well. Instead of attempting an apology - with doubtful results ⁽⁷⁾ - I will leave you with just this caveat.

An earnest listener (now adopting a more conservative approach) anticipating extensive case-law and legal scholarship ⁽⁸⁾ related to competition law, dumping and state subsidies in the EEC Treaty of Rome, of 25 March 1957 (the EEC Treaty), might have taken the precaution of looking for the corresponding provisions in the Treaty of Assunción, of 26 March 1991 (the preliminary Treaty for the Common Market of the Southern Cone, the MERCOSUL Treaty) ⁽⁹⁾.

The proximity of the dates, which many of you might have noticed, may deserve more detailed consideration from many points of view, stretching from psychoanalysis (C.G. JUNG, esp. 1952 and 1954) ⁽¹⁰⁾ to the magical elements associated with repetition, pointed out by Mircea ELIADE (1949-1989, 1957-1965, 1976, 1978, 1983, 1971-1991, 1949-1969, 1958-1975) ⁽¹¹⁾ in traditional or "primitive" civilizations (C. RENFREW, 1973; J. READER, 1988; J. HAWKES, 1976) ⁽¹²⁾ whereby it is attempted to appropriate the contents through the repetition of the continent, e.g., as in neolithic painting (H. KÜHN, 1958; et al.) ⁽¹³⁾. Unfortunately, no such analysis is possible here.

Such preparation, before coming here today, assuming that earnest listeners are not yet extinct, inevitably reminds me the tale of the preacher who ends his sermon, one Sunday, requesting his congregation to read MARK chapter xvii for the following Sunday. Had this preacher also been a law lecturer, he would have been aware that this is the best way

to see your congregation dwindle to the point of extinction, before the following service. The preacher, with some luck, meets his full congregation on the following Sunday, and, in response to his request that all who had read MARK chapter xvii stand up, all present rose in unison, whereupon the preacher commenced his sermon on lying, well suited for the congregation on that particular Sunday, as the Gospel of MARK only has sixteen chapters.

Therefore I do not intend to ask whether or how far anyone has been looking for the corresponding provisions in the MERCOSUL Treaty.

Today's "congregation" certainly might question the choice of "competition law" as well as a comparative approach to the E.C. and the MERCOSUL, considering the divergent nature of each: with competition law in the European Community we have a reality, while in the MERCOSUL, its presumed counterpart, it is merely a prospect, and furthermore one attracting serious and wide-ranging doubts as to its eventual scope and contents. Opinions on this range from a significant aspect of the legal-economical-political and institutional life of the countries involved in the effort down to a purely theoretical wishful thinking anticipatorily dismissed as one more in a line of many hegemonic and/or integrational initiatives undertaken and thereafter voided by history.

Long and tedious, even superfluous, would it be to recount the evolution of Europe, since the beginning of the XIVth century (A. BLACK, 1992; R.H. FOERSTER, 1963; J.-B. DUROSELLE, 1965 & 1976; A. CAVANNA, 1982; J. BOUDET, 1991) ⁽¹⁴⁾ from DANTE to Pierre DUBOIS (ca. 1306), from Enea Silvio PICCOLOMINI (1454) to George PODIEBRAD (1464), from ERASMUS of Rotterdam (1517) to the Duke of SULLY (1632), from Gottfried W. LEIBNIZ (1670) to William PENN (1692), from Jean-Jacques ROUSSEAU (1756) to Immanuel KANT (1784 and 1795) and so forth from H. KEYSERLING (1928) to Karl JASPERS (1947, 1949) ⁽¹⁵⁾, or more specifically of Western Europe in the aftermath of World War II - until this ideal is turned into a concrete political will, with Winston S. CHURCHILL (1946, 1948), Robert SCHUMAN (1950) and Konrad ADENAUER ⁽¹⁶⁾ - in spite of the fact that the repetition of known stories is a key to easy success in many different fields of knowledge (E. POUND, 1954)⁽¹⁷⁾ - but one fact may not be omitted: attempts at economic integration in Western Europe are directly and necessarily linked to the disastrous consequences of World War II, this having been a vital condition for all such subsequent endeavours.

Starting with the comparative approach, one conclusion may be drawn immediately: no similar catastrophe on a continental scale has ever occurred among neighbours in South America. The highlights on this particular topic do not extend much beyond the rows between Brazil and Argentina over the Cisplatine Province, i.e., Uruguay, during the first half of the XIXth century and the ravage done by the three aforementioned in Paraguay, during the second half of the XIXth century. The level of destruction and inhumanity that Europe unleashed on itself and the world twice, that in this century alone, remains unmatched (i.a., ALAIN, 1936; William L. SHIRER, 1950; H.R. TREVOR-ROPER, 1964; A.J. TOYNBEE, 1972; J. DROZ, 1972; J.-B. DUROSELLE, 1978; B. TUCHMAN, 1984; P. KENNEDY, 1988; E. BEHR, 1989; D. VAGTS, 1990) ⁽¹⁸⁾. I cannot refrain from expressing my concerns about the striking similarities presented by some recent events.

This does not mean that the neighbours do not have a guilty conscience or have avoided strained relations vis-à-vis Paraguay, until nowadays - as the insertion of preferential clauses in favour of Paraguay (both for its lesser importance and for historic reasons) and of Uruguay (for its lesser importance) tend to suggest. What happened, disastrous as it may have been, is more apt to have exacerbated differences than to have created a "day-after-feeling", strong enough to overcome such differences, as was possible in Western Europe only after 1945.

The difference in historic momentum may be further stressed by comparing Western Europe immediately after the war to the countries in the Southern Cone of the Americas today: integration may be necessary in both cases, but, badly off as the MERCOSUL countries may be today, their situation certainly not comparable to Europe in 1945. While being too badly off has a positive side, it may also hinder an awareness of the inevitable need for a true and wide-ranging economic integration effort, such as was undertaken in Europe, in an attempt to leave behind centuries of conflict for a new era of regulated and institutionally integrated economic life.

Furthermore there is no parallel in the context of the Southern Cone, especially because no one seems to be willing to make extensive investment in the development of these four countries - unfortunately the MARSHALL Plan and the BRADY Plan have few, if any, similarities - regardless of speculations and conjectures about the relevance, e.g., of German investment in Brazil, or the privileged role Brazil might play in connection with international economic operations for Japan (L. HOLLERMAN, 1990) ⁽¹⁹⁾, and hard as it

may be to view Brazil, a hard-to-fit-into-the-pattern-country from the outside (e.g., E. TAIEB and O. BARROS, 1989) ⁽²⁰⁾.

In the E.C. we have over four decades of effective experimentation verging towards full implementation of a new supranational institutional and legal order, while the MERCOSUL is so far no more than a project, a plan that may come to be seriously considered or may in the end be deprived of any effect due to shifts in political concerns or party priorities.

Comparison between the E.C. and the MERCOSUL rests on this fundamental difference, that the former is 'real' while the latter is merely 'prospective'. Such circumstance, if it does not make the comparative approach utterly impossible, must at least entail a considerable margin for error. The purpose of this analysis, therefore, will be prudently limited to searching for achievements, highlighting successes, and trying to determine how far similar parameters might be transferred or translated into the MERCOSUL effort.

Among such 'success stories', competition law is arguably one of the most outstanding - not only because detailed regulation of the economy is mandatory on a common market scale and has been adequately done in the E.C., and if we were to transfer the EC provisions, they would displace nothing because, surprisingly enough, no similar provisions at all have been placed in the preliminary MERCOSUL Treaty!

An effective comparative approach should detect successes achieved in one particular case, namely, competition law in the European Community, while searching for generally applicable concepts, i.e., the theory of competition law, or at least devising a framework translatable into a different context, such as requirements and expectations for competition law in the MERCOSUL - a subject which seems to have been carefully avoided so far, particularly in view of the lack of such a legal tradition in countries like Brazil and Argentina. Nor is there even a national equivalent, such as the role played by German Competition Law for the E.C., that could be transposed to a supranational scale within the MERCOSUL: so such legal concepts will have to be developed **ab ovo**, from scratch.

Similarly as with the E.C., regulatory provisions related to competition law will have to be set up against a hostile background. Each of the MERCOSUL countries, especially Brazil and Argentina, have in the past adopted in varying degrees strict restrictive business and commercial policies, allegedly intended to safeguard "national industry"

against merciless "foreign" competition, with disastrous or at least non-competitive results.

Therefore to effectively implement competition law in the MERCOSUL economic area the first step would be to roll back time-honoured protectionist tendencies in the two most significant economic powers. It should be acknowledged, nevertheless, that Argentina may be a few steps ahead of Brazil in reversing the effects of such an undesirable and doubtful heritage.

Legal science does not require new creations from chaos: grafts and transfer are normal, often workable, increasing in number and becoming a permanent part of the new legal landscape, provided the environment is not entirely hostile to the in-coming buds or shoots, and institutional devices for implementation are controlled and guaranteed by an independent arbiter, in this case, a supranational Court, having full and unconditional jurisdiction on all matters related to the "common", i.e., the supranational rules.

It is essential that such 'supranational rules' should not be interpreted by each national Court, within its national legal framework and case law. The inevitable differences in interpretation and implementation would lead to quite varying results within a short period, leading to differing case law and evolution.

This is the second element of the comparative approach: the crucial role played by the Court of Justice of the European Communities in the formation and evolution of Community Law, specifically in connection with Competition Law, not forgetting the ensuing additional references to other legal fields where ECJ case-law had a relevant effect in the construction of a Community-wide legal framework.

My audience is perfectly aware of the extension and relevance of such jurisprudential developments within the E.C. - no extensive references being required in support of my assertion (M. LAGRANGE, 1967, 1968; M. CASANOVA-DEMARCHI, 1969; L. PLOUVIER, 1975; R. LECOURT, 1976; M. WELBROECK, 1982; J. MERTENS DE WILMARS, 1976, 1981, 1986; J. MISCHO, 1990; et al.) ⁽²¹⁾. Surprisingly enough the adoption of a similar institutional device in the MERCOSUL is an idea not favoured by the majority, it being very likely that the "final" MERCOSUL Treaty, intended to replace the "preliminary" Treaty of 1991, at the end of the transition period, from 1995 onwards,

will maintain the device of "arbitration panels" for settlement of differing interpretations, putting in jeopardy the entire integration effort and its legal regulatory framework.

There are examples of failed attempts in the recent past to be avoided by the MERCOSUL. Latin American or preferably Interamerican integration has never worked properly. ALALC and ALADI, not to mention other subregional attempts, such as the Andean Pact or CARIFTA, were grandiloquent labels that hardly ever went beyond that.

There is a terminological issue already at stake, the very concept of "Latin America". Taken for good currency abroad, it seems clear only if seen from abroad, as was stressed by authors such as Manuel BONFIM, at the beginning of the century (1905, 1929), and there have been a few, if any changes since ⁽²²⁾. The entire concept of Latin America seems to rely more on a sentimental than on an actual basis, be it viewed from an economic or from a sociological perspective. But irrationality is not an exclusive feature of Latin America, considered as a whole. Brazil and Brazilians, aptly points out J. O. de MEIRA PENNA, should grow up institutionally and politically, in order to come to their own age of reason (1967, 1972, 1974, 1980, 1985, 1988, 1988, 1991, 1992) ⁽²³⁾.

A conceptual point may be usefully raised right at the beginning: from inside "Latin-America" it is more common to mention the different national identities. A "Latin American identity" is in itself questionable, even doubtful, and only operates to differentiate from non-Latin America ⁽²⁴⁾, just as one should avoid mentioning "Eastern" Europe as that term is more of an outdated political than an actual geographical concept and is made otiose by recent changes, rather than "Central" Europe, which is both geographically and politically correct and not subject to sudden changes in fashion, as scholarly research over the decades well evidences (e.g., R. SCHLESINGER, 1945; S. PAPCKE and W. WEIDENFELD, eds., 1988; B. DOPPLER, E. JAHN & K. GYÖRGY, 1989; R. KURZ, 1991; A. PRZEWORSKI, 1991) ⁽²⁵⁾.

The uncertainties around the eventual institutional features and the effective implementation of the MERCOSUL are and for a certain time to come will remain unresolved, since the "final" MERCOSUL Treaty is now being negotiated.

Allegedly the short transition period stipulated in the so-called "preliminary" MERCOSUL Treaty of 1991, ending on 31 December 1994, was intended to avoid a long term of inaction, during which instead of paving the way with required steps for completion of

the Common Market of the Southern Cone, the governments and entrepreneurs would be more likely to delay all action until the last minute. A short deadline brings about the intended "deluge feeling" of the need to hurry-up: the day of doom is coming closer, there is no time left for inaction, forcing initiatives to be taken on the spot, thus compensating for both the personality and the reigning atmosphere in the region.

Therefore, today's attempt at a comparative approach to competition law in the E.C. and the MERCOSUL should be taken neither for more nor for less than it is: not for more, in the sense that a "complete" or "final" view of the matter is not yet feasible, in regard to the "final structure" of the European Union ⁽²⁶⁾ but particularly in connection with the MERCOSUL; nor for less, in the sense that the experience of the European Community, taken apart from those features too particular to the context of Western Europe in the aftermath of World War II, may still provide valid parameters for economic integration attempts in other regions, especially regarding some of its most significant and innovative features, such as the role of the supranational ECJ, which has been of paramount importance in the effective building of the legal system of the European Community, especially in connection with art. 177 EEC, in the interpretation and application of Community Law and in the formation and development of one of the most important fields for any attempt at building a "Common Market", namely, an adequate and detailed regulatory system for competition law.

Some of these issues may have to be addressed rather briefly or may not yet be entirely assessed: it should be understood that this entire process is being developed simultaneously in Europe and in the "New World" ⁽²⁷⁾, under different conditions, both in North and South America, and its outcome is yet to be known to the full extent. Within a few years it will be extremely interesting to compare NAFTA and the MERCOSUL, with reference to the present situation, issues and perspectives.

Going beyond obvious differences, the aim of this lecture is to reach a sub-layer of common features, attempting to reach the "coincidentia oppositorum", conceptually proposed by NICHOLAS OF CUSA ⁽²⁸⁾.

After these introductory remarks, I would like to consider articles 85 and 86 EEC Treaty and the present structure of the MERCOSUL, before coming to a few comments on the political dynamics of economic integration, and to my final remarks and perspectives.

Notes

- (1) Francis M. CORNFORD, "Before and after Socrates" (Cambridge, CUP; 1st. ed., 1932; reprint 1950); Constantin RITTER, "The essence of Plato's Philosophy" (1933; transl. by Adam ALLES, New York, Russell & Russell, 1968); R. L. NETTLESHIP, "The theory of Education in Plato's Republic" (with an intr. by Spencer LEESON, Oxford, OUP, 1st. publ. 1933, reprint, 1969); Werner JAEGER, *Paideia: Die Formung des Griechischen Menschen* (Berlin, W. de Gruyter, 1936; transl. into Port. Artur M. PEREIRA, São Paulo, Martins Fontes, new ed., 1979; livro terc., pp. 439/933); R.H.S. CROSSMAN, "Plato to-day" (London, George Allen & Unwin Ltd.; 1st. publ., 1937; rev. 2nd. ed., 1959); Albin LESKY, "Geschichte der Griechischen Literatur" (Bern/ München, Francke Verl., 1957/58; dritte, neu bearbeitete u. erw. Auflage, 1971; V."C".1, pp. 568/614); Olof GIGON, "Les grands problèmes de la philosophie antique" (trad. M. LEFEBVRE; Paris Payot, 1961); W. K. C. GUTHRIE, "A History of Greek Philosophy" (esp. vol. III, Cambridge, CUP, 1969); A. J. FESTUGIERE, "Contemplation et vie contemplative selon Platon" (Paris, Vrin, 4e. éd., 1975), as also his "Études de philosophie grecque" (Paris, Vrin, 1971).
- (2) SCHADEWALT, Wolfgang, *Die Anfänge der Philosophie bei den Griechen: Tübinger Vorlesungen I: Die Vorsokratiker und ihre Voraussetzungen* (1950-1972; unter Mitwirkung von Maria SCHADEWALT, hrsg. von Ingeborg SCHUDOMA, Frankfurt a/M, Suhrkamp Verlag, 1978, pp. 14/15):

"Diese sokratischen Fragen wird nun verbunden mit dem Begriff des Philosophierens: Aneignung von Wissen, Trachten nach Wissen. Nicht perfektes Wissen und ein Verfügen darüber, das auch den Stolz und die Arroganz bewirkt, ein Wissender zu sein. Im Gegenteil: ein Wissen, das man nur vollziehen kann im Wissen des Nichtwissens, in einem Prozess. Dies ist es, was SOKRATES tut, wenn er die Leute befragt, etwa was die Tapferkeit ist oder die Gerechtigkeit, und dann zeigt, daß sie keine Ahnung haben. Das führt zum Gespräch, zur Eklektik, 'Widerlegung', und so ist es denn bei PLATO das Gespräch, das große Teile - nicht das Ganze! - des Philosophierens trägt. Nicht der grosse zusammenhängende Lehrvortrag, den man nicht nachprüfen kann und der zu einem Schein des

Wissens führt, sondern ein der Wahrheit Nachgehen im Gespräch, ständig sich kontrollierend, immer wieder fragend: **homologeís**, 'buchst du gleich mit mir?', und wenn ja, kann man zum nächsten Schritt in der Bilanz gehen. Es geht darum, ständig im Einverständnis zu sein."

- (3) Alfred EINSTEIN, *Greatness in Music* (transl. by César SAERCHINGER of *Größe in der Musik*, 1st. publ. 1941 by Oxford UP; New York, Da Capo pb, 1st. pb. printing, 1976).
- (4) P. B. CASELLA, *Elementos de direito comunitário* ("tese de livre docência", delivered to the Law School of the University of São Paulo as of 28 April 1993, 1051 pages).
- (5) Alfred EINSTEIN, *Greatness in Music* (op. cit.; preface pp. vi/vii).
- (6) I have been dealing with the subject recently, such as, i.a.: "O direito da concorrência na CEE e no MERCOSUL" (lecture delivered upon invitation from the São Paulo Lawyers Association, 19 March 1992; in the series "As tendências de integração e globalização dos sistemas jurídicos e o direito brasileiro: algumas influências e perspectivas"; also available in video); "Enfoque comparativo do direito da concorrência na CEE e no MERCOSUL" (lecture delivered to the Legal Commission of the French Chamber of Commerce, São Paulo, 28 April 1992; also publ. *Atualidades Jurídicas*, no. XXXIII, 06/92, the full issue); "Análise comparativa da concorrência na C.E. e no MERCOSUL" (lectures delivered upon invitation from the German Chambers of Commerce for Asunción, Buenos Aires, Montevideo, Porto Alegre, Rio de Janeiro and São Paulo, July 1992); "Droit de la concurrence dans la C.E. et le MERCOSUL: essai d'une approche comparative" (*Lettre du Brésil*, CCFB, Rio de Janeiro, no. 165, Sept. 1992); "Direito da concorrência na C.E. e no MERCOSUL" (as a chapter in the vol. *MERCOSUL: das negociações à implantação*, ed. L.O. BAPTISTA and A.A. MERCADANTE, S. Paulo, Ed. LTr, 1993); "Soberania e direito da concorrência na C.E. e no MERCOSUL" (RIL, Brasília, 31.1994, no. 121, in printing).
- (7) PLATO in twelve volumes (bilingual edition, with an English translation, LOEB Classical Library, HARVARD U.P./Heinemann; "Apologia", vol. I, 1st. publ., 1914; reprint, 1977, pp. 61/145).

- (8) The extent of available legal scholarship on E.C. Competition Law makes extensive quotations utterly impossible, not to say useless.
References will be restricted to works more or less closely connected with my research.
- (9) References to the "Southern Cone" are to be understood as encompassing the four member-States of the MERCOSUL, namely Argentina, Brazil, Paraguay and Uruguay.
Chile would geographically be within such concept, politically, at least for the time being, Chileans seem to be doing much better by themselves and intend to stay outside the current developments, or may eventually come to closer or looser integration with the NAFTA. I.a. see, Francisco ORREGO-VICUÑA, *La participación de Chile en el sistema internacional* (Santiago de Chile, Gabriela Mistral, 1974).
The very definition of "Latin America" raises an issue by itself (see note 22 below).
- (10) Carl G. JUNG, esp. his *Symbols of Transformation and The Archetypes and the collective Unconscious* (respectively *Symbole der Wandlung* and *Von den Wurzeln des Bewusstseins*, Zürich, Rascher, 1952 and 1954; *Collected Works of C. G. JUNG*, transl. by R. F. C. HULL, New York, Bollingen/ Princeton, vol. 5, 1st. pb. ed., 1976 and vol. 9, part I, 1980).
- (11) Various studies by Mircea ELIADE evidence this trend, e.g.: *Traité d'histoire des religions* (Paris, Payot, 1949, reprint, 1989); *Le sacré et le profane* (Paris, Gallimard, 1965; or. publ. *Das Heilige und das Profane*, Rowohlt's Deutsche Enzyklopädie, 1957); *Histoire des croyances et des idées religieuses* (I: *De l'âge de la pierre aux mystères d'Eleusis*, Paris, Payot, 1976; II: *De Gautama Bouddha au triomphe du Christianisme*, Paris, Payot, 1978 and III: *De Mahomet à l'âge des réformes* (Paris, Payot, 1983); *La nostalgie des origines: méthodologie et histoire des religions* (Paris, Gallimard, 1971, reimpr., 1991); *Le mythe de l'éternel retour: archétypes et répétition* (Paris, Gallimard, 1949; nouv. éd., 1969); *Rites and symbols of initiation: the mysteries of birth and rebirth* (New York, Harper & Row, 1st. publ., 1958; reprint, 1975).

- (12) Colin RENFREW, "Before Civilization": the radiocarbon revolution and prehistoric Europe (London, Penguin, 1st. publ. 1973; reprint, 1990); John READER, "Man on Earth": a celebration of Mankind (New York, Harper & Row, 1st. publ., 1988) and Jacquetta HAWKES (assisted by David TRUMP), "The Atlas of Early Man": concurrent developments across the Ancient World 35,000 B.C.-A.D. 500 (London, Macmillan, 1976).
- (13) Herbert KÜHN, "Eiszeitmalerei 50.000-10.000 v. Chr." (München, R. Piper & Co. Verl., 1958); Walter TORBRÜGGE, "Europäische Vorzeit" (München, Naturalis Verl., n/d); Magnus BACKES and Regine DÖLLING, "Die Geburt Europas" (München, Naturalis Verl., n/d).
- (14) Antony BLACK, Political thought in Europe 1250-1450 (Cambridge, CUP, Cambridge Medieval Textbooks, 1992); Rolf Hellmut FOERSTER (Hrsg.), Die Idee Europa 1300-1946: Quellen zur Geschichte der politischen Einigung (Munich, DTV, 1963); Jean-Batiste DUROSELLE, L'idée d'Europe dans l'histoire (Paris, Denoël, 1965) as well as his L'Europe de 1815 à nos jours: vie politique et relations internationales (transl. O. KRAEHENBUEHL, S. Paulo, Pioneira, 1976); A. CAVANNA, Storia del diritto moderno in Europa: le fonti e il pensiero giuridico (Milano, Giuffrè, "ristampa inalterata", 1982); Jacques BOUDET, Chronologie de l'histoire de l'Europe (Paris, Nathan, 1991).
- (15) For texts and comments see Rolf Hellmut FOERSTER (Hrsg.), Die Idee Europa 1300-1946 (1963; op. cit.); Hermann de KEYSERLING, Analyse spectrale de l'Europe: les Européens peuvent-ils se comprendre? (from the German original Das Spektrum Europas, 1928; transl. by A. HELLA and O. BOURNAC; Paris, Ed. Gonthier, 1965) Karl JASPERS, Vom europäischen Geist (lecture held at the Rencontres Internationales de Genève, Sept. 1947; Munich, Piper, 1947), as well as his "Vom Ursprung und Ziel der Geschichte" (Munich, Piper, 1949).
- (16) It is impossible to determine when this ideal turned into a concrete political will, but some of the highlights may be picked up: Winston S. CHURCHILL's Lecture at the University of Zurich (19 September 1946; W. S. CHURCHILL, The Sinews of Peace: postwar speeches; London, Cassel & Co., 1948); the SCHUMAN Plan (9 May 1950); text and comments apud Pascal FONTAINE, "Uma nova idéia de Europa: a declaração Schuman 1950-1990", Luxembourg, SOPEC, 1990, pp.

45/48) and Konrad ADENAUER, *Erinnerungen 1953-1955* (1966) and *1955-1959* (1967; see Robert Noll von der NAHMER, "EWG und Weltwirtschaft", *Integration*, 1970.1, pp. 1/9).

- (17) Ezra POUND, *Literary Essays of Ezra Pound* (ed. with an Introduction by T. S. ELIOT, London, Faber & Faber, 1st. publ., 1954; reprint, 1974), incl. "How to read" (1927/28, pp. 15/40) or his ABC of reading (transl. A. CAMPOS and J.P. PAES, S.Paulo, Cultrix, 3rd. ed., 1977) as well as in other essays, with his usual sardonic and biting sense of humour, POUND defines the art of easy success, as that writing which avoids unknown or unusual ideas, and spreads in every page only what an average reader paying average attention would be ready to perceive in a first reading.
- (18) Among hundreds of titles available some references turn up, e.g.: ALAIN, *Mars: ou la guerre jugée* (Paris, Gallimard, (c) 1936; ed. 1969); William L. SHIRER, *The rise and fall of the Third Reich: a History of Nazi Germany* (New York, Fawcett Crest, (c) 1950; 33rd. printing, Nov. 1989); Hugh R. TREVOR-ROPER (ed.), *Hitler's War Directives* (London, Pan Books, 1st. ed., 1964; 4th. printing, 1978; or. publ. Walter HUBATSCH, *Hitlers Weisungen für die Kriegsführung 1939-1945: Dokumente des Oberkommandos der Wehrmacht*, Frankfurt a/M, Bernard u. Graefe Verlag); Arnold J. TOYNBEE, *A Study of History* (Oxford/London, OUP/Thames & Hudson, 1972); Jacques DROZ, *Histoire diplomatique de 1648 à 1919* (Paris, Dalloz, 3e. ed., 1972); Jean-Batiste DUROSELLE, *Histoire diplomatique de 1919 à nos jours* (Paris, Dalloz, 7e. ed., 1978); Barbara W. TUCHMAN, *The March of Folly: from Troy to Vietnam* (London, Michael Joseph Ltd., 1984); Paul KENNEDY, *The rise and fall of the great powers* (London, Unwinn Hyman Ltd., 1988); Edward BEHR, *Hirohito: behind the Myth* (London, Penguin, 1st. publ., 1989; reprint 1990). See also Joachim C. FEST, *Hitler: eine Studie über die Angst* (transl. A.L. TEIXEIRA-RIBEIRO, A. NOGUEIRA-MACHADO, A. PANTOJA and F.M. ROCHA Fo., São Paulo, Nova Fonteira, 2nd. ed., 1976); Albert SPEER *Erinnerungen* (transl. R. XAVIER, São Paulo, Artenova, 4th. ed., 1976).

All history books related with the period could provide such an overview. Mention of one or another does no more than reflect the taste of the reader, such as, e.g., David THOMSON, *World History 1914-1961* (Oxford, OUP, 1964; Galaxy

Books, vol. 116); Geoffrey BARRACLOUGH, *An Introduction to Contemporary History* (1964; reprinted in Penguin Books, London, 1990).

For an approach from the specific viewpoint of international law see Detlev F. VAGTS, "International Law in the Third Reich" (AJIL, 84.1990. 3, pp. 661/704).

- (19) Leo HOLLERMAN, "The role of Brazil in Japan's economic strategy: implications for the United States" (J.W.T., 24.1990.1, pp. 25/37).
- (20) E.g., in a recent book by Eric TAIEB, assisted by Octavio BARROS, *Économie et société brésiliennes: croissance ou développement?* (Paris, Nathan, 1989).
- (21) Maurice LAGRANGE, "The Court of Justice as a factor of European integration" (AJCL, 15.1967, no. 4, pp. 709/725), "La interpretación unitaria del derecho de las Comunidades Europeas: aspecto de la acción prejudicial" (DI, 3.1968, Oct., pp. 59/80); Manuel CASANOVA-DEMARCHI, *La función jurisdiccional en las Comunidades Europeas y la del proceso de integración latinoamericano* (Santiago de Chile, Editorial Jurídica, 1969); Liliane PLOUVIER, *Les décisions de la Cour de Justice des Communautés européennes et leurs effets juridiques* (Bruxelles, Bruylant, 1975); Robert LECOURT, *L'Europe des juges* (Bruxelles, Bruylant, 1976); Michel WAELBROECK, "Le rôle de la Cour de Justice dans la mise en oeuvre du Traité CEE" (CDE, 18.1982, no. 4, pp. 347/380); Jose MERTENS DE WILMARS, "La jurisprudence de la Cour de Justice comme instrument de l'intégration communautaire" (CDE, 12.1976, nos. 2-3, pp. 135/148), "L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers" (CDE, 17.1981, no. 4, pp. 379/409), "Réflexions sur les méthodes d'interprétation de la Cour de Justice des Communautés européennes" (CDE, 22.1986, no. 1, pp. 5/20); Jean MISCHO, "Un rôle nouveau pour la Cour de Justice?" (RMC, 33.1990, no. 342, pp. 681/686) et al.
- (22) Manuel BONFIM, *A América Latina: males de origem* (Rio/Paris, H. Garnier Ed., 1905) e *O Brasil na América: caracterização da formação brasileira* (Rio, Livr. Francisco Alves, 1929). His tone may be assessed with this brief quotation from the introduction to the latter (op. cit., 1929, pp. 11/17):

"Nós outros - Argentinos, Peruanos, Brasileiros, Chilenos ... - que somos dos chamados latino-americanos, nunca pensamos em América Latina. Para os nossos conceitos de realidades, no simples positivo das relações comuns, ou como convergência de qualquer ação imediata, tal unidade não existe. Consideramos, apenas, cada um dos povos com que os dissertadores formaram o latinismo da América. O mesmo acontece a qualquer estrangeiro que aqui tenha feito vida conosco: falará de - Venezuela, Paraguay, México, Nicarágua ... mas nunca sentirá necessidade de concentrar o espírito nesse conceito - América Latina. Em compensação todos que não nos conhecem, si fazedores de theorias, com língua em cousas sociaes, historicas ou politicas, não falham no repetir de emphaticos e pueris preconceitos a cerca da irreal unidade - América Latina."

Without further developments, it may be worth pointing out that the entire set of Interamerican Conventions on Private International Law (Panamá, 1975 and Montevideu, 1979) has not yet come into force. Latin American Cooperation and Legal Integration is a matter of unresolved requirements and expectations.

- (23) José Osvaldo de Meira PENNA, *Psicologia do subdesenvolvimento* (Rio, APEC, 1972); *O Brasil na idade da razão* (Rio/Brasília, Forense Universitária/INL, 1980); *A ideologia do século XX: uma análise crítica do Nacionalismo, do Socialismo e do Marxismo* (São Paulo, Convívio, 1985); *O dinossauro: uma pesquisa sobre o Estado, o patrimonialismo selvagem e a nova classe de intelectuais e burocratas* (São Paulo, T.A. Queiroz Ed., 1988); *Utopia brasileira* (Belo Horizonte, Itatiaia, 1988, col. Ensaios, vol. 13); *Opção preferencial pela riqueza* (Rio, Inst. Liberal, 1991); *Decência, já!* (São Paulo, Nórdica/Inst. Liberal, 1992)
- (24) Pierre SALAMA and Jacques VALIER, *L'Amérique latine dans la crise: l'industrialisation pervertie* (Paris, Nathan, 1991)
- (25) Rudolf SCHLESINGER, *Federalism in Central and Eastern Europe* (Londres, Routledge Kegan Paul Trench Tubner & Co. Ltd., 1st. publ., 1945); Sven PAPCKE and Werner WEIDENFELD (Hrsg.), *Traumland Mitteleuropa? Beiträge zu einer aktuellen Kontroverse* (von J. ROVAN, E. HUSEK, F. BONDY, Z. MLYNAR, A. HEGEDUS, P. BENDER, W. WEIDENFELD, K.D. VOIGT, K. GRÖBE-HAGEL, S. PAPCKE, H. RUDOLF und E. TRUGLY, Darmstadt,

Wissensch. Buchges., 1988); Bernhard DOPPLER, "Zur Diskussion um Mitteleuropa" (Dialog, 15.1989, n. 2, Juli, Thema: Mitteleuropa?, pp. 59/70); Egbert JAHN, "Zur Debatte über Mitteleuropa im westlichen Staaten" (idem, pp. 40/50); Konrad GYÖRGY, "Mitteleuropäische Meditationen an der Bruchlinie zweier Zivilisationen" (idem, pp. 7/28); Robert KURZ, Der Kollaps der Modernisierung: vom Zusammenbruch des Kasernen-Sozialismus zur Krise der Weltökonomie (Frankfurt a/M, Vito von Eichborn GmbH & Co. KG Verl., 1991) and Adam PRZEWORSKI, Democracy and the Market: political and economic reforms in Eastern Europe and Latin America (Cambridge, CUP, Studies in rationality and social change; 1st. publ., 1991; reprint, 1992).

- (26) Edmund DUCKWITZ, Der Vertrag über die Europäische Union (Saarbrücken, VRBEI, No. 270, 1992); Jean-Luc MATHIEU, La Communauté européenne: marché ou État? (Paris, Nathan, 1990; esp. chap. xiii: 'l'indispensable état fédéral', pp. 211/214); Neill NUGENT, The government and politics of the European Community (Durham, Duke UP, 1st. publ., 1989; 3rd. printing, 1991); William WALLACE (ed.), The dynamics of European Integration (London, RIIA/Pinter Publ., 1990).

In the series of the Saarbrücken VRBEI quite a few forthcoming titles address the issues of the European Union.

- (27) Garcilaso de la VEGA Inca referring to the new Continent stresses its originality stating "toda razón le llaman Nuevo, porque lo es en toda cosa" (Comentarios reales, 1609 and 1617; apud Bella JOZEF, Historia da literatura hispano-americana, Rio, F. Alves, 3a. ed., 1989).
- (28) Karl JASPERS, Anselm and Nicholas of Cusa (edited by Hannah ARENDT, translated by Ralph MANNHEIM; from The Great Philosophers: the Original Thinkers, vol. II; New York, Harcourt Brace Jovanovich, 1st. Harvest ed., 1974; pp. 26/182) as well as my own "Nicolau de Cusa" (Liturgia e Vida, Rio, XXXII.1985, no. 191, nov.-dec., pp. 18/31).

2. Articles 85 and 86 EEC-Treaty and the present Structure of the MERCOSUL

An increase in the number and significance of market regulations among the most discernible features and appearances is neither a recent nor an isolated phenomenon. It corresponds to a structural change in the contemporary State - not to be analyzed here, since the concept of "Wirtschaftsrecht" first appeared (HEDEMANN, 1922; KIRALLY, 1934; M. VASSEUR, 1959, 1964; G. FARJAT, 1963, 1982) ⁽¹⁾ - with a direct and critical influence on economic life and social structures of the countries involved (O. GOMES and A. VARELA, 1977; W.P.A. de SOUZA, 1980; A. BRETAS et al., 1980; G. BOGNETTI, 1983; E.R. GRAU, 1978, 1981, 1988, 1990; F.F. SCAFF, 1990; M.G. FERREIRA Fo., 1990; I. VAZ, 1992; F. NUSDEO, 1993) ⁽²⁾ while also having an effect on the regulation of economic activities at an international level (C. MELLO, 1993; F. DE LY, 1992) ⁽³⁾.

This phenomenon also tends to increase and intensify their effects vis-à-vis their inevitably ensuing extraterritorial projections (F.A. MANN, 1964, 1984, 1990) ⁽⁴⁾. Because most legal systems only regulate economic rules as *lex fori* rules, under the heading of extraterritorial effects three main possibilities are to be considered: applying rules of public-policy of a national legal system, rules of foreign public-policy of the legal system connected to the contract, and the public-policy rules of a third State. To these issues must be added the consideration of whether and to what extent a foreign public-policy rule should be applied. The answer will depend on the status given by the *lex fori* to the foreign public-policy rules and the interaction between economic rules issued by different legal systems.

Fascinating as the topic of extraterritorial projections of economic, namely competition, law may be (G.A. van HECKE, 1962, 1977; B. GOLDMAN, 1969, 1969-ff., 1972; M. HAYMANN, 1974, J.-G. CASTEL, 1983; I. JALLES, 1988; et al.) ⁽⁵⁾ this is and has to be treated as the main focus of a separate subject, and not just mentioned "*en passant*" (U. DROBNIG, J. BASEDOW, K. SIEHR, F. RIGAUX, A. V. LOWE and E.-J. MEST-MAECKER; 1986) ⁽⁶⁾.

The contribution and innovative features of United States Antitrust Law are not forgotten but will not be dealt with today: a comparison between E.C. and U.S. Law on Competition would also be an entire subject by itself, not forgetting that it has already been extensively studied.

The case of the European Community is not an isolated one under this particular heading (I. JALLES, 1988; L. FOCSANEANU, 1965 etc.; R. JOLIET, 1969; R.T. JONES, 1975; B. BALASSA, 1978; J. PEETERS, 1989; P.M. ROTH, 1992) ⁽⁷⁾, but the most specific and interesting feature of EC Competition Law is that it was conceived and applied from its very beginning as a supranational body of law to counteract former protectionist practices embodied in the legal systems and practices of the six original member States, directly impacting the economic life and legal systems of the countries involved in the experiment, which were bound to observe and strictly apply Community guidelines and regulations both at domestic and extraterritorial levels (see i.a., R. MERKIN, G. HARDING & K. WILLIAMS, 1987-ff.; M. van der WOUDE, Chr. JONES & X. LEWIS, 1992) ⁽⁸⁾.

The resulting conceptual change is that private economic and legal relations are restructured because of the intervening economic rules as public-policy rules. E.C. Law appears as a legal system of "economic democracy" (F. VILMAR, U. ANDERSEN and D. CASSEL, in D. NOHLEN, (Hrsg.), 1991) ⁽⁹⁾, whereby the original Treaties and the entire regulatory system, comprising regulations, directives and decisions, made by the Council or the Commission in order to carry out their task, in accordance with art. 189 EEC Treaty, are built into an "öffentliches Wirtschaftsrecht", or public economic law, as already stated by Attorney General ROEMER, as early as the case NOLD KG v. High Authority of the ECSC (Case no. 18/57, 1957) ⁽¹⁰⁾.

It has been argued (e.g., C. CHAMPAUD, 1970) ⁽¹¹⁾ that Community Law is the "outcome of an affair between a political dream and an economic will", whereby although initially resulting from International Conventions, celebrated and ratified among States (i.a., Ch. VALÉE, H. THIERRY, J. COMBACAU and S. SUR, 1981; Ch. ROUSSEAU, 1984; J.F. REZEK, 1984, 1991) ⁽¹²⁾ its contents embody an international regulatory system, of economic nature and regional character.

Notwithstanding the accuracy of the international convention statement the conventional basis of Community Law was soon superseded by the life and operation of the Communities and their institutions (i.a., E. NOEL, 1988; Rudolf BERNHARDT, 1984; Deirdre CURTIN, 1990; F. E. DOWRICK, 1983) ⁽¹³⁾. This experimental system went beyond interstate relations, regulated by traditional concepts of international law, and strictly avoiding any interference with sovereign, independent States (C.F. OPHÜLS, 1965; H.

MOSLER, 1966; M. WAELBROECK, 1964, 1972; M. WAELBROECK et al., 1976; P. PESCATORE, 1974; J.H.H. WEILER, 1981, 1984) ⁽¹⁴⁾, which proved to be insufficient to ensure valid legal and theoretical support for the entire range of complex issues faced by the Community legal system, in its rôle as the "internal legal system of a community of nations", whose aim was to build progressively a European federation (I. SEIDL-HOHENVELDERN, 1982; N. NUGENT, 1989; W. WALLACE (ed.), 1990)⁽¹⁵⁾. The device chosen for attaining such a European federation, ensuring the viability of the goal, was the construction of economic solidarity, now being strengthened to encompass more or less relevant political features, including alleged former omissions such as, i.a., the human rights issue (A. CLAPHAM, 1991; J.-F. FLAUSS, 1992) ⁽¹⁶⁾.

The process proved to be a progressive effort, in successive steps, from the building of the customs union to the implementation of the "common" market, whereby, in view of building closer ties among national economies integrated in such a common market, have been established unified systems for free circulation of goods, persons, services and capital, after completion of the customs devices apt to ensure the uniform operation of such market, avoiding the weight of internal distortions. Such "common" market is now stepping towards an economic and monetary union and eventually some degree of political union as well, of which some of the requirements are being brought to the fore such as, i.a., the evolution of the European Monetary System and its currency, the ECU, and the definition of common policies in fields stretching from the environment to consumer protection, from industrial to consequential policies, from agriculture to competition.

With the aim of implementing this Community, the member States have initially built an economic unit, to such an extent that the means seemed to be turning into ends by themselves, considering that the great majority of regulatory provisions, issued by Community Administration, focus on the regulation of economic activities within the Community.

European Community Law is unmistakably and essentially a system of economic law with specific contents and based upon the premise of the acknowledgment of the efficiency of market economy, and the precedence of this system in Western Europe. Such articles of economic faith have been incorporated into the EEC Treaty as legal provisions, having significant effect upon Community Law as a system of economic law, not only for its essence but also for the nature and the orientation of its regulations separately considered.

The last decades have evidenced the appearance and development in Europe of three elements, consisting of (a) structuring and development of complex post-industrial economic systems, with concurrent essential evolution, both in social as well as in economic matters; (b) building of an entirely new supranational legal system, namely E.C. Law; and (c) the birth and growth of economic law as an autonomous legal field, with inevitable overlaps among the three phenomena mentioned, resulting in the first truly and deeply liberal yet extensively regulated economic legal order of supranational application.

From the viewpoint of liberal economics, Community Law sets a new standard: never before has there been, to a similarly comprehensive and thorough extent, such a protection of economic freedom, embodied in a complex and precise body of law, regulating in detail the performance of economic agents, while combining such contents with the features of an intrinsically supranational system, avoiding reference to traditional international rules.

Community Law on competition evidences the need for the coexistence of market security and market freedom, replacing and counteracting opposed former protectionist trends and regulatory systems at national levels. Community Law embodies many teachings worth noting, starting with the positive effects of detailed market regulation, ensuring adequate levels of competitiveness, and the ensuing technical progress being transferred as benefits consumers, at growing speed and declining costs, to which it may be added institutional stability, stretching from the reasonable levels of profit expectations to reliable price levels, not to mention, under a broader view, collateral effects stretching from social to macro-economic effects, conceptually as innovative as its supranational character.

Extensive quotations in E.C. Competition Law would be as hazardous as useless, in view of the bulk and the level of quality attained, comprising regulatory provisions, case-law and legal scholarship ⁽¹⁷⁾, and needless to say there is awareness of such contents and features from the audience ⁽¹⁸⁾. My assumption is also broad enough to comprise that it is neither necessary nor is it my intention to resume a presentation of the MERCOSUL as such, such a presentation having been proficiently done already (e.g. J. SAMTLEBEN and C. SALOMAO, 1992) ⁽¹⁹⁾.

Therefore, I do not intend to resume presentation and comments on articles 85 and 86 EEC, and subsidiarily articles 87 to 94 EEC as well, but we ought to keep in mind the

legal and institutional framework set up by these provisions and subsequent regulations and binding interpretative criteria laid down by ECJ case-law as well as the effect of such liberal inspiration, based on the dynamism of market forces, already mentioned in article 3.(f) EEC, as a body of rules organizing and regulating competition within Community boundaries.

Fields covered by E.C. Competition Law, ranging from concerted practices to abuse of dominant positions, from dumping to governmental subsidies, provide a comprehensive legal frame for the exercise and development of economic activities. The simple mention of the main fields covered by E.C. Competition Law is apt to evidence the needs within the MERCOSUL and the lacunae of its preliminary Treaty.

The preliminary MERCOSUL Treaty, as mentioned, executed in Asunción, on 26 March 1991, came into force in Brazil as of 29 November 1991 ⁽²⁰⁾, stipulating it should "be performed and fulfilled as fully as stated therein", in view of the implementation of the Common Market of the Southern Cone, the MERCOSUL, until 31 December 1994 (art. 1), based on the reciprocity of rights and obligations (art. 2), with a "transition period" (art. 3), extending until the date of implementation (stipulated in art. 1).

Already in the "whereas" section, second paragraph, there was mention of the "coordination of macro-economic policies", not forgetting to mention, in the following paragraph, the tendency towards "evolution of international events towards consolidation of large economic areas, and the relevance of achieving an adequate international economic insertion for its member States".

Economic performance rules are stated in art. 4, stipulating that "in their relations with third countries, member-states will ensure equitable conditions of trade", stressing that "for such purpose, the national legal systems will be applied, to deter imports whose prices may be influenced by subsidies, dumping or any other unfair trade practices", while, internally, "similarly, member-states will coordinate their respective national policies in view of structuring common rules on commercial competition".

The assignment of jurisdiction to the "national legal systems" should be a matter of concern; in the meantime no such "structuring of common rules on commercial competition" has yet occurred. Such a matter, handled by different national legal systems, is apt to produce substantially different results. Such diversity, within an attempt at building eco-

nomic integration as recent as the MERCOSUL is prone to generate more trouble than uniform principles. A common basis will be lacking, until such "common rules on commercial competition" are structured, if ever.

From the foregoing, it might be assumed that, in view of the implementation of a common market, it would be foreseeable to go through the preliminary steps of a customs union, combining a uniform customs tariff in their relations with third countries, with the elimination, or at least the substantial reduction of internal tariffs, among member-states, before going ahead towards a "common market".

The following provision, art. 5, deals with the "progressive, linear and automatic tariff reductions", to be made simultaneously with the "elimination of all other restrictions, or of all charges having equivalent effect", in view of the goal of ending the transition period and "reaching the deadline of 31 December 1994 with zero tariff, without barriers, including non-tariff barriers, on the entire tariff range".

The deadline of 31 December 1994, in addition to the already mentioned "day of doom" feeling it is aimed to stir, not leaving time for hesitations, will not represent the implementation of the internal market - as seems to have been broadly and wrongly assumed - but will simply mark the end of the transition period, during whose term member-states are bound to adjust progressively their respective internal tariffs vis-à-vis the other member-states, while the negotiation of the final Treaty, which will replace the preliminary Treaty, is completed.

This should be the initial step towards a customs union, referring to a common customs tariff, that is also intended to "foster the competitiveness of member States" (art. 5.(a) and (c)).

The "coordination of macro-economic policies" (art. 5.(b)) is the mandatory following step, considering that it is not viable to intend to reach a "common market" without a minimum level of economic coordination among its partners, and their aim is also expressed in the wish to "adopt specific sectorial agreements, in view of fostering the use and the assignment of production factors, and reaching efficient operative scales" (art. 5.(d)), at the risk of rendering void the efforts in view of the customs union, as above mentioned.

Notwithstanding the foregoing, the common customs tariff and the mere approximation rather than effective coordination of macro-economic policies do not seem enough, *per se*, to conduct the partners in this venture in the Southern Cone towards true and relevant economic integration, without the concurrent and firm political will to achieve such goals, there being the risk of merely reissuing former projects, or not going beyond some features of a free trade area, with many imperfections.

Differing levels of economic integration may or may not be achieved within a simpler institutional framework; the NAFTA Agreement could be cited as evidence. The "common market" label is not essential to achieve economic integration, as in the NAFTA case, at least under present features, it is not a question of a "common market" but rather, as stated, a "free trade" area - but I am again obliged to refrain from a review of its contents, within the limits of today's lecture.

Even if such a political will to achieve full economic integration was to be found in the member-states in the Southern Cone, and its permanence could be ensured within the MERCOSUL, the legal structures being formulated are too simple and technically not prone to set up the legal environment apt to pave the way towards an effective "common market", which would also require the free circulation of economic factors of production, goods, persons, services and capital, while competition and levels of state interference in and over economic activities were strictly regulated.

The mere "approximation of macro-economic policies in view of formulating common rules on commercial competition", stated in art. 4, represents substantially less than the uniformization and the level of detail of competition rules contained in arts. 85 to 94 of ECC Treaty. My assertion is not to be understood as implying that EC Competition Law would be the sole legal framework apt to convey such a favorable environment, but it is and remains an extraordinarily useful tool of trade in the effort for building a true and wide-ranging "common" market.

The actual features of such "approximation of macro-economic policies" will have to be specified, in view of stating under unified and stable provisions, the contents of such "common rules on commercial competition". In that respect, competition law has played a crucial role in the structuring of the legal and institutional environment set up within the European Community, for all its implications and consequences in the economic life of the twelve member-states.

Seen from inside, critics tend to concentrate on missing details, forgetting the imposing ensemble already built: notwithstanding shortcomings and areas requiring extensive restructuring, Community Law is an achievement, not only as the regulatory system of the E.C. but also as an institutional and legal pattern for similar issues under different contexts.

Viewing E.C. Law from such a perspective its relevance may be better assessed, also as a source for comparative law analysis, along lines such as is being attempted today. Direct transference of E.C. Law to other continents and circumstances may not be feasible and is not to be attempted as such: that would oversimplify the issue, and miss the point up to which the parameter set up by E.C. Law is a valid standard of inspiration for other efforts.

Nevertheless, successful solutions should not be disregarded when similar issues are being faced. Especially because within the E.C. there were also contrary tendencies resulting from national historical traditions and legal systems opposed to or at least not built to foster integration: the impact of such forces had to be stopped and reversed, in order to reach a new trend. The achievements over the four past decades are relevant enough not to be dismissed as an experience that is too specific to be useful elsewhere.

I hope this parallel becomes clear when we set down what has been achieved under the heading of E.C. Competition Law and distill similar needs for the MERCOSUL, before moving ahead to an inquiry into the political dynamics of economic integration, such as, in the case of the European Community, the interesting though different levels of relations with third countries or groups of countries.

Notes

- (1) After HEDEMANN, in his *Grundzüge des Wirtschaftsrechts* (1922): F. de KIRALLY, "Le droit économique, branche indépendante de la science juridique: sa nature, son contenu, son système" (*Études en honneur de François GENY*, Paris, 1934, pp. 111 ff.); Michel VASSEUR, *Le droit de la réforme des structures industrielles et des économies régionales* (Paris, LGDJ, 1959); Michel VASSEUR, "Un nouvel essor du concept contractuel: les aspects juridiques de l'économie concertée et contractuelle" (*R.T.D. Civil*, 1964, pp. 1 ff.); Gérard FARJAT, *L'ordre public*

économique (Paris, LGDJ, 1963); Gérard FARJAT, Droit économique (Paris, PUF, 1st publ., 1971; 2nd ed., 1982). Extensive bibliographical references will be avoided.

- (2) Orlando GOMES and Antunes VARELA, Direito econômico (São Paulo, Saraiva, 1977); Washington P. A. de SOUZA, Direito econômico (São Paulo, Saraiva, 1980); Anchises BRETAS et al., Direito econômico do planejamento (Belo Horizonte, Fund. Vale Ferreira, 1980); Giovanni BOGNETTI, Costituzione economica e Corte costituzionale (Milano, Giuffrè, 1983); Eros R. GRAU, Planejamento econômico e regra jurídica (S. Paulo, Ed. RT, 1978); Elementos de direito econômico (S. Paulo, Ed. RT, 1981); Direito, conceitos e normas jurídicas (S. Paulo, Ed. RT, 1988); A ordem econômica na Constituição de 1988: interpretação e crítica (S. Paulo, Ed. RT, 1990); Fernando F. SCAFF, Responsabilidade do Estado intervencionista (S. Paulo, Saraiva, 1990); Manoel Gonçalves FERREIRA Fo., Direito constitucional econômico (S. Paulo, Saraiva, 1990); Isabel VAZ, Direito econômico das propriedades (Rio, Forense, 1992); Fábio NUSDEO, Elementos para uma codificação do direito econômico (Sao Paulo, "tese de cátedra", 1993).
- (3) Celso Duvivier de Albuquerque MELLO, Direito Internacional Econômico (Rio, Renovar, 1993); Filip DE LY, International Business Law and Lex Mercatoria (The Hague/Amsterdam, T.M.C. ASSER Instituut/ North Holland, 1992).
- (4) Francis A. MANN, The doctrine of jurisdiction in International Law (RCADI, 1964-I, t. 111, pp. 1/162), as well as The doctrine of international jurisdiction revisited after twenty years (RCADI, 1984-III, t. 186, pp. 11/115), and his note "The extremism of American extraterritorial jurisdiction" (ICLQ, 39.1990, part II, pp. 410/412).
- (5) Concerning extraterritorial projections or effects of law, or specifically competition law, bearing in mind some of the most relevant contributions, see, i.a.: Georges A. van HECKE, Le droit antitrust: aspects comparatifs et internationaux (RCADI, 1962-II, t. 106, pp. 253/356) and also "Règles antitrust et concentration d'entreprises à l'échelon international" (1977; collected in Misc. Georges van HECKE, Antwerpen, Kluwer, 1985, pp. 85/96); Berthold GOLDMAN, Le champs d'application territoriale des lois sur la concurrence (RCADI, 1969-III, t. 128, pp.

631/729), as well as "Les effets juridiques extraterritoriaux du droit de la concurrence" (RMC, 15.1972, pp. 612 ff.), and also (the relevant items for this matter in his) *Droit commercial européen* (Paris, Dalloz, 1st. publ. 1969; and subsequent editions); Michael HAYMANN, *Extraterritoriale Wirkungen des EWG-Wettbewerbsrechts* (Dissertation, Zürich/Baden-Baden, ed. n/s, 1974); Jean-Gabriel CASTEL, *The extraterritorial effects of Antitrust Law* (RCADI, 1983-I, t. 179, pp. 9/144); Isabel JALLES, *Extraterritorialidade e comércio internacional: um exercício de direito americano* (Lisboa, Bertrand Ed., 1988).

- (6) In addition to the foregoing sources, it is also worth mentioning the seminar "Extraterritoriale Anwendung von Wirtschaftsrecht" (held at the Max Planck Institut für ausländisches und internationales Recht, Hamburg, 16/17 April 1986, celebrating the 60th. Anniversary of the Institute; *RabelsZ* 52.1988, nos. 1-2, pp. 1/302; comprising contributions by U. DROBNIG, J. BASEDOW, K. SIEHR, F. RIGAUX, A. V. LOWE and E.-J. MESTMÄCKER; followed by discussions coord. by H. BERG, K. ANDREGG and Chr. ENGEL, the latter having drawn up a thematic summary, pp. 256/302).
- (7) I. JALLES (1988, quoted above); Lazar FOCSANEANU, "Le droit de la concurrence de la CEE et le droit antitrust des États-Unis" (RMC, 8.1965, pp. 342/349); René JOLIET, "Monopolisation et abus de position dominante: essai comparatif sur l'article 2 du Sherman Act et l'article 86 du Traité de Rome" (RTDE, 1969, pp. 645 ss.); Robert T. JONES, "Droit antitrust américain et droit européen de la concurrence: étude comparative" (RMC, 18.1975, no. 181, pp. 20/32); Bela BALASSA, "The new protectionism and the international economy" (JWTL, 12.1978, pp. 409 ff.); Jan PEETERS, "The rule of reason revisited: prohibition on restraints of Competition in the Sherman Act and the EEC Treaty" (AJCL, 37.1989, no. 3, pp. 521/570); P. M. ROTH, "Reasonable extraterritoriality: correcting the 'balance of interests'" (ICLQ, 41.1992, April, pp. 245/286).
- (8) Robert MERKIN (Gen. Ed.), Geoffrey HARDING (European Ed.) & Karen WILLIAMS (Consulting Ed.), *Encyclopedia of Competition Law* (London, Sweet & Maxwell, 1987-ff. & publ. updates); Marc van der WOUDE, Christopher JONES & Xavier LEWIS, *EEC Competition Law Handbook 1992 edition* (London, Sweet & Maxwell, 1992).

- (9) Fritz VILMAR, "Wirtschaftsdemokratie", Uwe ANDERSEN, "Wirtschaftspolitik", Dieter CASSEL, "Wirtschaftssystem" (in Dieter NOHLEN, Hrsg., Wörterbuch Staat und Politik, Bonn, Bundeszentrale für Politische Bildung, 1991).
- (10) Case NOLD KG v. High Authority of the ECSC (Case no. 18/57, 1957; ECR 121).
- (11) Claude CHAMPAUD, "L'apport du droit communautaire au droit économique" (CDE, 6.1970, no. 5, pp. 557/567).
- (12) Among many others, see: Charles VALÉE, H. THIERRY, Jean COMBACAU and S. SUR, Droit international public (Paris, Montchrestien, 3rd. ed., 1981); Charles ROUSSEAU, Droit international public (Paris, Dalloz, 10th. ed., 1984); José Francisco REZEK, Direito dos Tratados (Rio, Forense, 1984); and Direito internacional público (S.Paulo, Saraiva, 2nd. rev. ed., 1991).
- (13) Emile NOEL, As instituições da Comunidade (Luxembourg, SPOCE, 1988); Rudolf BERNHARDT, As fontes do direito comunitário: a 'Constituição' da Comunidade (in Trinta anos de direito comunitário, Luxembourg, SPOCE, 1984, pp. 73/86); Deirdre CURTIN, "The province of government: delimiting the direct effect of Directives in the Common Law context (ELR, 15.1990, no. 3, pp. 195/223); F.E. DOWRICK, A model of the European Communities Legal System (YEL, 3.1983, pp. 169/237); etc.
- (14) Carl Friedrich OPHÜLS, "Staatshoheit und Gemeinschaftshoheit: Wandlungen des Souveränitätsbegriffs" (in: Recht im Wandel: Festschrift 150 Jahre Carl Heymanns Verlag, Cologne, Heymann, 1965, pp. 519/590); Hermann MOSLER, "Die Entstehung des Modells supranationaler und gewaltenteilender Staatenverbindungen in den Verhandlungen über den Schuman-Plan" (in: Probleme des Europäischen Rechts: Festschrift für Walter HALLSTEIN, 1966, pp. 355 ff.); Michel WAELBROECK, "Peut-on parler d'un droit constitutionnel européen?" (in: Traités internationaux et juridictions internes dans les pays du Marché Commun, Bruxelles, IEE-ULB, vol. II, 1964); Michel WAELBROECK, "Effets internes des obligations imposées à l'État" (in Misc. W.J. GANSHOF van der MEERSCH, Bruxelles, 1972, tom. II, pp. 573/583); Michel WAELBROECK, E. STEIN and P. HAY, European Community and Institutions in perspective (Bobbs-Merrill, 1976); Pierre PESCATORE, "Les exigences de la démocratie et la légitimité de la

- Communauté européenne" (CDE, 10.1974, no. 5, pp. 499/514); Joseph H. H. WEILER, "The Community system: the dual character of supranationalism" (YEL, 1.1981, pp. 267/306); Joseph H. H. WEILER, *Il sistema comunitario europeo: struttura giuridica e processo politico* (Bologna, Il Mulino, 1984).
- (15) Ignaz SEIDL-HOHENVELDERN, *Die Ueberleitung von Herrschaftsverhältnissen am Beispiel Oesterreichs* (Vienna, Springer Verl., 1982); Neill NUGENT, *The government and politics of the European Community* (Durham, Duke UP, 1st. publ., 1989; reprint, 1991); William WALLACE (ed.), *The dynamics of European integration* (London, RIIA/Pinter Publ., 1990).
- (16) Andrew CLAPHAM, *Human rights and the European Community: a critical overview* (Florence/Baden-Baden, EUI/Nomos Verl., 1991); Jean-François FLAUSS, *Les droits de l'homme comme élément d'une constitution et de l'ordre européenne* (Saarbrücken, VRBEI, No. 264, 1992); etc.
- (17) See, i.a., references above. E.C. Competition Law scholarship is reaching ungodly proportions, with so many authors having dealt with different aspects of the subject, extensive quotations would be a separate work in its own right, going beyond the scope of this lecture. From my own experience, just the bibliographical references on competition law, tax and legal harmonization comprise over 60 pages of my *Elementos de direito comunitário* (S.Paulo, 1993, pp. 787/849).
- (18) The catalogue of the contributions in the Europa-Institut series of "Vorträge, Reden und Berichte" gives a perfect example, growing to an impressive bulk of legal scholarship, comprising already over three hundred titles since 1981.
- (19) For a presentation of the main legal features and background of the MERCOSUL Treaty I refer to Jürgen SAMTLEBEN and Calixto SALOMAO Filho, "Der Süd-amerikanische Gemeinsame Markt: eine rechtliche Analyse des MERCOSUR" (*Zeitschrift für Wirtschafts- und Bankenrecht, Wertpapier Mitteilungen: Sonderdruck*; 46.1992, Teil I, no. 33, pp. 1345/1384; Teil II, no. 34, pp. 1385/ 1424).
- (20) Decreto no. 350, dated 21 November 1991, in force as of 29 November 1991: "em vigor internacional e para o Brasil, em 29 de novembro de 1991".

3. Political Dynamics of Economic Integration

The example of the European Community, in addition to its intrinsic relevance and effect, is also extremely useful as an evidence of the political dynamics inherent to economic integration efforts, also providing a parallel for analysis of different contexts, especially when attempts at different levels of economic integration are undertaken.

Economic integration is not merely a "technical" process as such but engenders ensuing factors, which might be brought under a general reference as the political dynamics of its own, with wide-ranging consequences, comprising the definition of levels of association within and without such economic integration attempts combined with the restructuring of traditional patterns, from the classical standards of state sovereignty to the exercise of jurisdiction, both territorial and extraterritorial, by this very same state (P. CASELLA, 1994) ⁽¹⁾.

As aptly noted by Neill NUGENT (1991), the Community should not be viewed too narrowly: "Whilst many of the factors which have influenced its development have applied to it alone, many have not. This is most clearly seen in the ways in which modernisation and interdependence, which have been crucial in the creation of many of the central features of the Community, have produced similar effects elsewhere in the international system - albeit usually to a more modest degree. There has, for example, been a steady increase in the number and variety of international actors, and some corresponding weakening in the dominance of states. An increasing range of methods and channels are used by international actors to pursue their goals. (...) And there has been a decline, in the Western industrialized world at least, in the use of physical force as a policy instrument - conflicts over trade imbalances and currency exchange rates are not solved by armed conflict but by bargaining, adjusting and compromising" ⁽²⁾.

Such matters do not lend themselves to easy conclusions: the changes since 1989 have been too deep and too unexpected to have yet been fully assessed (R. KURZ, 1991; J. A. MOISÉS, ed., et al., 1992; C. FURTADO, 1993; A. HIRSCHMANN, 1993; C. OFFE, 1993; etc.) ⁽³⁾, and it is more likely that we shall have to ruminate over them for the next few years, not only from the perspective of the European Community, now scheduled to turn into the "European Union" within a foreseeable future (G. RESS, Hrsg., 1988; M. BANGEMANN, 1989; R. BIEBER, 1983; J.-P. JACQUÉ, 1985; K.-H. NARJES, 1987; A. STEPNIAK, 1985; J. WEILER, 1987; M. R. WILL, Hrsg., 1985; D. WILLOWEIT,

1990; L. BOLIS, 1990) ⁽⁴⁾, while also contemplating market trends and other integration attempts worldwide, with distinct results (C.D.A. MELLO, 1993; M. SMEETS, 1990; Y. CHALOULT, 1993) ⁽⁵⁾.

The combination of modernisation and interdependence within economic integration requires an interplay of elements among which, or rather as "primus inter pares", has to be redefined the very concept or dogma of state sovereignty, considering the creation of supranational structures, as elements of an entirely new supranational legal order (D. SIDJANSKI, 1990 and 1961; E.-S. KIRSCHEN, 1987; H.-G. KOPPENSTEINER, 1963; J. WEILER, 1981; N. SCHUMACHER, 1988; J. ZEEGERS, 1989) ⁽⁶⁾ - a relevant conceptual innovation E.C. Law has brought, being directly applied vis-à-vis national legal systems, national courts and administrations, individuals and corporate entities, within which the economic integration efforts come into play.

The choice made within the E.C., building economic solidarity with the aim of achieving, in the future, some form of political union as well, was not done as a result of an *a priori* choice, but came by as an alternative, in view of the failure at agreeing directly some form of political or external defense union, e.g., the failed attempts at the Western European Union or the European Defense Community (M. SORENSEN, 1952; P. REUTER, 1952; H.F. ARMSTRONG, 1954; M. KOHNSTAMM, 1956; H. RIEBEN, 1956; M.J. de SOTO, 1956; K. ADENAUER, 1953-55, 1955-59; A. H. ROBERTSON, 1957, 1961; T. SCITOVSKY, 1958; W. DIEBOLD Jr., 1959; L. LISTER, 1960; E. BENOIT, 1961; E.B. HAAS, 1961; H.O. SCHMIDT, 1962; B. VOYENNE, 1964; J.-Cl. MASCLÉ, 1973) and was eventually evolved along the way (J. SCHWARZE (ed.), 1989; A. SAUWENS, 1987; BIEBER/ BLECKMANN/ CAPOTORTI u.a., Hrsg., 1981; M.E. BATHURST, K.R. SIMMONDS, N. MARCH HUNNINGS & J. WELCH, eds., 1972; S. BERNARD, 1971; H. von der GROEBEN, 1969; H. SCHNEIDER, 1969; W. HALLSTEIN, 1960; J. MONNET, 1955, 1976) ⁽⁷⁾.

These aspects have been dealt with so far, but to the foregoing could now be added the recent and extremely interesting developments in the relationship between the E.C. and other countries and/or groups of countries, and from that point onwards to attempt to sort out some of the features and issues of the political dynamics of economic integration (D. COOMBES, 1970; J. RIDEAU, ed., 1973; J. CAPORASSO, 1974; L. HURWITZ, 1980; P. FONTAINE, 1990) ⁽⁸⁾.

The external relations of the E.C. were left open to a certain extent (L.-J. BRINKHORST, 1984; P. LACHMANN, 1984; F. E. DOWRICK, 1983) ⁽⁹⁾. This means that strict and comprehensive regulations were not made from the beginning; nonetheless no relevant conceptual changes have been achieved since then (e.g., B. CONFORTI, 1964; A. CASSESE, 1960) ⁽¹⁰⁾. The development and the role of the E.C. as a major trading partner made its profile at international level increasingly visible, and the acceptance of the European Community as a subject of international law more widespread.

Still more interestingly, there has been less a theoretical enquiry than a practical consent and acceptance, due to trade needs and convenience, implicitly based on the principle stipulated by Art. 2 of the Vienna Convention on Diplomatic Relations, whereby "the establishment of diplomatic relations between states and the exchange of permanent diplomatic missions is made by mutual consent".

As a consequence, the E.C. has built a net of relations with different countries and/or groups of countries. The external relations of the E.C. are well known and well studied (J. v. ARNIM, 1993; J. BOULOIS, 1978) ⁽¹¹⁾, and it is not necessary to recount them here (F. MOUGIN, 1980; P. PESCATORE, 1979-80) ⁽¹²⁾, nor will such external relations be considered in the perspective of the relationship between E.C. Law and International Law (e.g., W.J. GANSHOF van der MEERSCH, 1975) ⁽¹³⁾. But the relations *per se*, between the E.C. and different countries and/or groups of countries and their different categories might be useful to illustrate the point I would like to stress.

These countries and/or groups of countries might approximately be divided in four categories, each of which can be separately considered, with many issues related thereto, namely: (a) the EFTA countries, either in the perspective of the European Economic Area, the EEA (e.g., Cl.-P. LUCRON, 1990; D. THÜRER, 1990) ⁽¹⁴⁾ or each of them separately - foremost with Austria (A. MOK, 1990; I. SEIDL-HOHENVELDERN, 1990, 1983, 1982, 1981, 1980, 1963, 1955; F. WEISS, 1977; A. NYDEGGER, 1962; G. STADLER, 1989; N. WIMMER & W. MEDERER, 1990; H. WOLLMANN, 1991) ⁽¹⁵⁾, to a lesser degree with the Scandinavian countries, and a separate and less probable case for Switzerland (D. SCHINDLER et al., 1990) ⁽¹⁶⁾; (b) the Central European countries, now emerging from decades of centrally-planned economies into free market and politically democratic systems, to be more or less closely connected with the European Community, initially through trade agreements, also called "first generation" and impending "second generation" agreements with the E.C., later building closer ties,

verging towards full membership, within the next decade (A. PRZEWORSKI, 1992; D. HOROWITZ, 1991; S. SENIOR NELLO, 1990; P. NARAY, 1989; T. SARKOEZY, 1987) ⁽¹⁷⁾; (c) the ACP countries, within the framework of the Fourth Lomé Convention until the year 2000; and (d) other countries, mostly underdeveloped countries, mainly those already covered by the ACP-EC Lomé Agreements (BONKO-LULA, 1981; H.-B. KROHN, 1975; J.-Cl. GAUTRON, 1980, 1986; P. JULLIARD, 1986; D.C. BACH, 1986; F. de la SERRE, 1986; A. te PASS, 1985; M. LAKE, 1985; T. YARD, 1985-86; C. COVA, 1988, 1988-bis, 1990; F. NICORA, 1990; J.M. ANACORETA CORREIA, 1990; J.-Cl. MULLER, 1991) ⁽¹⁸⁾, the European Community having become the first financier power for development programs abroad, from 2.7% of the total amounts in 1970/71 to 35.5% in 1986/87, displacing the United States and Japan to the second and third places respectively (R. A. BARBOSA, 1991) ⁽¹⁹⁾.

Even within this fourth and last group of States, "Latin American" countries are being left behind other less developed countries, with dwindling share of total trade and progressive loss of relative importance as a trade partner to the E.C., downsized from a yearly average of 29.4% in the period 1961/63 to 19.2% yearly average in the period 1982/84 ⁽²⁰⁾. Add to this the unfavourable consequences of more than a decade of stagnation and growing problems, the 80's, the so-called "lost decade" for "Latin America".

The point in mentioning such external relationships here is to hint at the circumstance that European integration has not only had crucial effects vis-à-vis its member-States, but also relevant consequences at world level, building a major economic and eventually political power, necessarily to be taken into account when major issues are at stake. Examples might be quoted both in favour of and against the assertion above, but the trend is clear enough not to be subject to controversy.

The present focus on the political dynamics of economic integration is not an attempt at rewriting the theory of economic integration, already done well enough by different authors, with emphasis on different aspects, over the decades (e.g., C.D.A. MELLO, 1993; F. DE LY, 1992; B. BALASSA, 1962; J.E. MEADE, 1955; J. TINBERGEN, 1954; J. VINER, 1950; W. KAUFMANN, 1924) ⁽²¹⁾ or adopting a more or less conceptual approach to the European integration (i.a., A. H. ROBERTSON, 1957 & 1961, quoted above, as well as M. ALLAIS, 1960; K. SCHMID, 1966; M. BYE, 1970; K. LIPSTEIN, 1974; H. SMIT & p. HERZOG, eds., 1976-ff.; G. RESS, G. LÜKE u. M.R. WILL (Hrsg.), 1983; G. MOREAU, 1984; J. PELKMANS, 1984; M.O. PICQUET-

MARCHALL, 1985; M. LABORI & D. BOURDELIN, 1986; A.M. BIRKE & G. HEYDEMANN, Hrsg., 1989; J.-L. MATHIEU, 1990; D. LASOK & J.W. BRIDGE, 1991; P. MAILLET & Ph. ROLLET, 1991; and many others) ⁽²²⁾.

Notwithstanding the success story in Western Europe since World War II, not excluding the possibility of significant extensions within the present decade, with the more or less realistic perspectives of a more or less integrated Europe stretching from the Atlantic to the Urals within concentric circles of integration levels, regional integration attempts in Latin America have had a less than successful record.

The great disparity between the emphatic optimism of official talks and the voidness of results becomes clearly perceptible when one attempts any private initiative. Private entrepreneurs tend to be wary of being lured into the official enthusiasm of integration talks, viewing the process more clearly and critically, in terms of cost-benefit relations.

In a critical view, it is obvious that regional economic integration in the Americas never reached an adequate level of institutional dynamics, i.e., has never worked properly, be it as device for integration or as a restructuring of mental structures in view of development (G. PENDLE, 1963, reprinted 1990; J. RIDEAU, 1973; M. FLORY, 1974; A.F. LOWENFELD, 1979; P. MAYER, 1979 et sqq.; R.-J. DUPUY, 1979; 1980, ed., and 1981, ed.; J.W. CHAPMAN & J.R. PINNOCK, eds., 1982; L.E. HARRISON, 1985; B. M. CARL, 1986; N. HARRIS, 1986; H. de SOTO, 1990) ⁽²³⁾.

It could be argued that a regional model or pattern for economic integration in the Americas has never been developed, which does not mean that extensive writing on the topic is lacking. There are literally entire libraries of studies and reports on economic integration in Latin America, mostly from an economic-political perspective (R. CARBALLO-LAZARO, W. BALIERO SILVA and H. RODRIGUEZ MELITON, 1973; S. ANDIC & S. TEITEL, eds., 1977; L.R. CACERES, 1980; J. CASTANEDA et al., 1976; F. FAJNZYLBER, ed., et al., 1980 & 1981; R. FFRENCH-DAVIS, ed., et al., 1983; E.F. LIZANO, ed., et al., 1975; F. ORREGO-VICUNA, ed., et al., 1974; C. PORTALES, ed., et al., 1983; L. TOMASSINI, ed., et al., 1981; special issue, RIL, 21.1984, no. 81, passim and A.F. MONTORO, 1992) ⁽²⁴⁾, but if these are to be evaluated by the results so far achieved, little remains of any relevance.

Such a model or pattern, as stated, would not necessarily have to follow strictly choices made within the E.C., to the extent that many of the circumstances are different, but some similarities may be drawn, some general concepts could be reached, in order to set up a valid frame for experience with economic integration in the Americas.

One of the most relevant aspects seems to be dismissingly taken for granted: the issue of state sovereignty (A. M. ORANTES, 1980; G.O. MARTIN, 1980; E.A. GIBSON, 1983; F. POCAR, 1984; C.R.M. PELLEGRINO, 1985; J.R. VANOSSI, 1986; J.M. VACCHINO, 1981, 1982, 1983, 1985, 1986) ⁽²⁵⁾; there has and there is abundant talk on more or less grandiose - to avoid saying grotesque - plans for economic integration between "brother countries" and "friendly neighbours" in "Latin" America, but the hardcore is carefully avoided.

Paraphrasing a cynical remark about politics in Latin America, "everything must be changed, so that everything remains the same". To evoke a comparative picture, talking about integration without restructuring both the concept and the implementation of state sovereignty seems to me like pretending to be willing to make an omelette without breaking eggs: I can hardly see how or rather how far one could intend to reach a "common market" such as the MERCOSUL, without going deeply into such thinking, in view of some sort of hybrid or innovative model. State sovereignty does not have to be wiped out; it has to be restructured so as not to block the way for proper functioning of integration attempts.

This point seems to be missed even by authors discussing economic integration requirements, even at a theoretical or conceptual level (see, e.g., R.A. BARBOSA, op. cit., 1991, also quoting Manfred MOLS, of Mainz University in a lecture allegedly held in Montevideo, in 1990) ⁽²⁶⁾ whereby the "possibility of European integration serving as a model for Latin-american integration offers few elements ("poucos elementos paradigmáticos") taking into account the diversity of the historical, political, social and economic context of the two regions" and goes ahead to state: "As known, the legal foundations (Treaties of Rome/EEC and Paris/ECSC) and the community institutional devices (supranational organisms) are totally different from those chosen by Latin America (Montevideo Treaties of 1960 and 1980/ ALALC and ALADI). In a Europe marked by nationalism and devastating wars there was the necessity of transferring, for instance, some part of national sovereignties to supranational organisms. This is not the historic context of Latin Ame-

rica, and for this and for other reasons, Latin-american integration is being built on different basis" (27).

Worse than not achieving any concrete results is to pretend to justify such inefficiency behind distinct conceptual choices. There are few exceptions (J.A. ESTRELLA FARIA, 1990) (28) while many authors tend to take for granted economic integration.

The opportunity for an adequate regulation and insertion of these issues within Brazilian legal system could be the pending constitutional reform in Brazil (e.g., D.F. MOREIRA NETO, 1991; J. CRETELLA Jr., 1993; P. CASELLA, 1993; L.O. BAPTISTA, 1992) (29); oh, yes, already, for the Constitution of 1988, but the view of indispensable structural changes seems to attract only a minority (see V. MAROTTA RANGEL, 1993) (30).

Amazing as it may be, the Treaty of Asunción has not created any jurisdictional institution. During the transition period, i.e., 1991-1994, it was stipulated "in order to facilitate the constitution of the Common Market" that the Member States adopt a system of peaceful dispute settlement, according to Exhibit III of the Treaty (art. 3). By 31 December 1994 the Parties are bound to adopt a permanent system of peaceful dispute settlement for the Common Market.

In compliance with art. 3 and Exhibit III of the Asunción Treaty there was signed, on 17 December 1991, the Brasília Protocol for Dispute Settlement ("Protocolo para a Solução de Controvérsias", hereinafter BPDS), valid only during the transition period, until the permanent system of peaceful dispute settlement for the Common Market comes into force, whereupon the device valid during the transition period is to be replaced (art. 34).

The procedures for dispute settlement stipulated in the BPDS are applicable for the settlement of disputes related to the interpretation, application or performance of provisions stipulated in the Asunción Treaty, in the related agreements and protocols, as well as the Decisions of the Common Market Council and the Relations of the Common Market Group, not being restricted however to controversies among Member States, comprising "claims submitted by private parties (individuals or legal entities)" (arts. 1 and 25 BPDS).

Without going into further details and technicalities, the Brasília Protocol remains strictly intergovernmental, it being incumbent upon a Member State to raise such a dispute (arts. 2 and 3 BPDS), whereby dispute settlement is to be achieved through *ad hoc* arbitration panels (to be constituted according to the provisions of arts. 9 to 14 BPDS, and to operate according to civil procedure rules stipulated in arts. 15 to 24 BPDS).

Sources for decisions are stipulated in art. 19 BPDS. Inevitable comparison turns up not only with art. 38 (I) (c) of the ICJ Statute, but also in a broader view, in connection with the "general principles of law recognized by civilized nations" (as reviewed, e.g., by Lord McNAIR, 1957; see also F.A. MANN, 1957) ⁽³¹⁾.

The BPDS regulates dispute settlement not only among States but also claims "submitted by private parties (individuals or legal entities), related to enforcement or application, by any Member State, of legal or administrative measures having restrictive, discriminatory or unfair competition effects, in violation of the Asunción Treaty, the related agreements and protocols, as well as the Decisions of the Common Market Council and the Relations of the Common Market Group" (art. 25 BPDS).

Such claims will initially be processed before the National Division of the Common Market Group in the Member State where the claimant has its domicile or main seat of business (art. 26.1 BPDS).

In the second step in the procedure, the National Division of the Common Market Group will contact either the Common Market Group or directly the National Division of the Common Market Group of the Member State against which a violation of the Treaty is alleged (arts. 27 and 28 BPDS).

The third step in the procedure takes place within the Common Market Group, in case any such claim is accepted, and involves submitting the claim to a three-member board of technicians.

The fourth step in the procedure, in case a favourable opinion towards any such claim is reached, is that any Member State may request against the claimed Member State the adoption of corrective measures or the revocation of the measures questioned (art. 32 BPDS).

Should the above stated procedure not be enforced, the fifth step is to be started, whereby an arbitration panel will be summoned, in accordance with the BPDS, regulating disputes among Member States, as already stated. This would be a long and difficult way to go, to end in a controversy between Member States.

This extremely complex procedure will become crucial if it is extended beyond the transition period as the permanent system of peaceful dispute settlement for the Common Market. Amazingly enough, many seem to favor such an alternative.

The inconvenience of such a permanent system of peaceful dispute settlement for the Common Market is manifold, to the extent that such a device (a) is bound to the present institutional structure of the MERCOSUL, which is very likely to change, and (b) no device for control of acts issued by the MERCOSUL institutions is stipulated.

I do not have to emphasize the crucial role played by the ECJ, not only vis-à-vis Member-states and private parties, to the extent that similar although not equivalent devices are stipulated within the MERCOSUL, but particularly through the exercise of rights of confrontation against Community institutions, in order to ensure the lawfulness of measures adopted. The lack of an equivalent device within the MERCOSUL should be a matter of concern.

V. MAROTTA RANGEL (1993, quoted) ⁽³²⁾ appropriately stresses that the "Brasília Protocol, subject to regulatory and institutional improvements, could be satisfactory for the purpose of dispute settlement, in a context of strict intergovernmental relations" but it seems clear that the BPDS "would not generate a 'corpus' of decisions ensuring the minimum level of uniformity required for interpretation (...) and application of community rules".

The capital sin of the Brasília Protocol, according to MAROTTA RANGEL is the failure to stipulate a device for the control of lawfulness of measures adopted by integration institutions ⁽³³⁾. Such a device is only viable if a Court of Justice is incorporated in the Community structures, as has been adopted both in the European Community and in the Andean Pact ⁽³⁴⁾.

Necessary and timely as it may be, the outcome of the MERCOSUL venture is jeopardized by such omissions: the lack of competition law provisions at 'Common Market' level and the absence of any jurisdictional institution.

Economic integration, allow me to stress it here today, is not to be taken for granted, it is not dispensed as a gift, it simply does not happen by itself; it has to be achieved, fighting against contrary tendencies; it requires the absolute conviction of its need, combined with steadfast political will to achieve any results. It only takes place where it is preceded by the conscience of its necessity; it has permanently to fight against isolationist and/or nationalistic trends and domestic lobbies, for the most varied markets or products; it will hurt powerful interests both at home and abroad, but this does not necessarily lead to dead-end streets, or heideggerian "Holzwege" ⁽³⁵⁾: the experience of the EC proves it is viable.

European integration is an example of an attempt that has succeeded while permanently adapting itself to needs and trends, during its evolution since the early 1950's. It is extremely interesting to trace the evolution of the discussion concerning some of these conceptual topics in Europe, since the early 1950's, while attempting to draw a parallel with the present context in the Southern Cone, in view of striking albeit latent similarities. There were long controversies about the distinction between opposing currents favoring 'intergovernmentalism' and 'supranationalism', reflecting choices made within the Council of Europe and the at the time six members of the European Communities (e.g., A.H. ROBERTSON, 1956, 1957, 1959; 1952, 1952, 1954, 1956) ⁽³⁶⁾.

Twenty-five years later, in the 1980's Joseph WEILER ⁽³⁷⁾, attempting to sum up the matter, on different occasions (1981, 1984, 1987), although criticizing the term "supranationalism", and attempting the definition of categories within such concept, or its "dual character" did not find any other more suited to replace it: "Does it still make sense to refer to the Community as a supranational system? And indeed what do we mean when speaking of such a system?" ⁽³⁸⁾.

Along these forty years the debate has oscillated around concepts such as "cooperation: integration: unification" and the "legal problems of European integration", quoting again Arthur H. ROBERTSON (in his books under such titles, published respectively in 1959 and 1957) ⁽³⁹⁾ described his work (1959) as "an essay in that branch of international law which is coming to be known as 'the law of international institutions'" and already

stressed that "the law of European institutions is developing beyond the traditional concepts of international law".

Referring to the opening of the (at the time) 'European Parliamentary Assembly' as another "great moment in European history, in which events occur which could change the fate of the nations", ROBERTSON (1959) although belonging to the Council of Europe ⁽⁴⁰⁾, insisted that the 'Europe of the Six' and its institutions be left wholly outside on the grounds that they "constitute a group which is 'sui generis'" since they "give expression to the will of the Six to engage in a process of integration involving the transfer of certain sovereign powers, which will probably lead during the lifetime of persons now living to some form of federation".

Simultaneously Max BELOFF, reviewing ROBERTSON's book (1959) remarked (1960) ⁽⁴¹⁾: "Mr. ROBERTSON's devotion to the cause of European integration tends to make him upon occasion over-emphasize the degree to which this has been achieved, as when he says that in the Consultative Assembly at Strasbourg 'the ties of party are stronger than those of nationality'. This should surely be qualified by a reminder that this is largely so only to the extent to which major elements of controversy between nations can be eliminated from the discussion".

Paradoxically we could say that both were and are correct: late in 1992 and early in 1993 we are still facing such antagonisms resulting from different trends, between "European integration" and "major elements of controversy between nations". Such opposition not only remains unsolved, but tends even to be aggravated by the European Union Treaty and subsequent evolution along such lines, despite its present surmountable hurdles.

My choice of the perspective of English legal scholarship is not innocent, considering the United Kingdom has - most often unjustly - been held to be the 'trouble-maker' of European integration. The differences of legal reasoning must not be stressed: they turn up by themselves (M.E. BATHURST, K.R. SIMMONDS, N. MARCH HUNNINGS, J. WELCH, eds., 1972) ⁽⁴²⁾ as aptly described by Lord DENNING, in *BULMER Ltd. vs. BOLLINGER S/A*, 1974 (1979) ⁽⁴³⁾ or also Georg RESS, Gerhard LÜKE and Michael R. WILL (Hrsg.), 1983; esp. G. CRISCUOLI, 1983; G. LANGROD, 1983; D. LASOK, 1983; see also M.P. FURMSTON, R. KERRIDGE, B.E. SUFRIN, eds., 1983; esp. D. FELDMAN, 1983 and J.J. FAWCETT, 1983; CHESHIRE FIFOOT & FURMSTON, 1986; P.B. CASELLA, 1989/90) ⁽⁴⁴⁾ but the conceptual approach seemed to be useful,

although references to the issue of legal harmonization and unification and their interplay with economic integration will be carefully avoided herein ⁽⁴⁵⁾.

The distinction between 'intergovernmentalism' and 'supranationalism' is not merely a technicality: it pertains to the essence of the process and impacts on its outcome. As long as the talks and discussions about economic integration in the Southern Cone remain within the boundaries of strict intergovernmentalism, it is hardly to be expected that such an 'economic integration' process may reach a 'political dynamics' of its own. This is a historical opportunity that should not be missed.

Some theoretical or conceptual points have to be possibly drawn from the EC experience, although how far this can be applied to Latin or any other America is another issue, again not to be addressed today. But this relevant contribution, for Europe itself and as a legal and institutional pattern, subject to changes, adaptations or even improvements may not, in good conscience, be so easily dismissed.

Notes

- (1) See above as well as my paper "Soberania e aplicação do direito da concorrência" (RIL, Brasília, 31.1994, no. 121, in printing).
- (2) Neill NUGENT, *The Government and politics of the European Community* (Durham, Duke UP, 1st publ., 1989; 3rd. printing 1991; "Conclusion: present realities and future prospects", p. 318).
- (3) Robert KURZ, *Der Kollaps der Modernisierung: vom Zusammenbruch des Kaserne-Sozialismus zur Krise der Weltökonomie* (Frankfurt a/M, V.v. Eichborn Verl., 1991; trad. Karen E. BARBOSA, Rio, Paz & Terra, 1992); Celso FURTADO, "Globalização das estruturas econômicas e identidade nacional" (Pol. Ext., 1.1993, no. 4, Mar.-May, pp. 3/10); José Alvaro MOISÉS (ed.), *O futuro do Brasil: a América Latina e o fim da Guerra Fria* (Rio, Paz & Terra, 1992); Albert O. HIRSCHMANN, "Será o fim da guerra fria um desastre para o 'Terceiro Mundo'?" (Pol. Ext., 1.1993, no. 4, Mar.-May, pp. 11/17); "The Political Economy of Latin American Development: seven exercises in retrospection" (Latin American Re-

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- (5) Celso D. de A. MELLO, Direito internacional econômico (Rio, Renovar, 1993); Maarten SMEETS, "Globalisation and the trade policy response" (JWT, 24.1990, no. 5, pp. 57/73); Yves CHALOULT, "NAFTA e o livre comércio nas Américas (BILA, no. 8, Jan.-Mar. 1993, pp. 96/97).
- (6) Dusan SIDJANSKI, "Actualité et dynamique du fédéralisme européen" (RMC, 33.1990, no. 341, Nov., pp. 655/665); "L'originalité des Communautés européennes et la répartition de leurs pouvoirs" (RGDIP, 1961, pp. 40 ff.); Etienne-Sadi KIRSCHEN, "Les sept piliers de la construction européenne" (RMC, 30.1987, no. 307, May-Jun., pp. 244/247); Hans-Georg KOPPENSTEINER, Die Europäische Integration und das Souveränitätsproblem (Baden-Baden/Bonn, Verl. A. Lutzeyer, 1963; vol. 14 of the series Handbuch für Europäische Wirtschaft); Joseph H. H. WEILER, "The Community System: the dual character of supranationalism" (YEL, 1.1981, pp. 267/306); N. SCHUMACHER, "Les métaphores du discours européen" (RMC, 31.1988, no. 314, Feb., pp. 81/86); Jacques ZEEGERS, "Mais

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- (15) Alois MOK, "L'Autriche, partenaire naturel de la CEE" (RMC, 33.1990, no. 333, Jan., pp. 3/7); Ignaz SEIDL-HOHENVELDERN, "L'immunité de juridiction des Communautés européennes" (RMC, 33.1990, no. 338, pp. 475/479); "Austrian cases on European Integration" (LIEI, 1983/1, pp. 13/25); Die Überleitung von Herrschaftsverhältnissen am Beispiel Österreichs (Vienna, Springer Verl., 1982); "Dienstrechtliche Klagen gegen internationale Organisationen" (in Festschrift für H.-J. SCHOCHAUER, 1981, pp. 628 ff.); "Europarecht im österreichischen Gesetz über das Studium der Rechtswissenschaften" (in: Festschrift für Stephan VEROSTA, Berlin, 1980, pp. 63 ff.); "Transformation or adoption of International Law into Municipal Law" (ICLQ, 12.1963, pp. 88/124); "Relation of International to Internal Law in Austria" (AJIL, 49.1955, pp. 451/476); Friedl WEISS, "Austria's permanent neutrality in European integration" (LIEI, 1977/1, pp. 87/127); A. NYDEGGER, "Die Einstellung der drei EFTA-Neutralen gegenüber der EWG" (WuR, 14.1962, no. 1, pp. 3/15); G. STADLER, Die EG und Österreich: Rechtsvorschriften und Dokumente/Die rechtlichen Beziehungen, mit einer Einführung von G. STADLER (Vienna, Manz Verl., 1989); Norbert WIMMER und Wolfgang MEDERER, "EG-Recht in Österreich: Die Auswirkungen des Gemeinschaftsrechts auf Österreich" (Vienna, Manz Verl., 1990); Hanno WOLLMANN, "Die kartellrechtlichen Beziehungen Österreichs zur EWG" (Vienna, Manz Verl., 1991).

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- (19) Rubens A. BARBOSA, "América latina em perspectiva: a integração regional, da retórica à realidade" (São Paulo, Aduaneiras, 1991) provides the figures quoted (pp. 35/36).
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- (26) Rubens A. BARBOSA (op. cit., 1991, also quoting Manfred MOLS, of Mainz University in a lecture allegedly held in Montevideo, in 1990).
- (27) R. A. BARBOSA (op. cit.; pp. 37/38).
- (28) José Angelo ESTRELLA FARIA, in his paper "Integração econômica na América Latina: sairemos do discurso?" (RDM, no. 79, Jul.-Sep. 1990, pp. 63/83), conveys his mood with a quotation from W. SHAKESPEARE's Hamlet, Act II: "What do you read, my lord? words, words, words".

- (29) Constitutional reform in Brazil could be a chapter by itself, not to be reviewed hereunder. Just one reference could be Diego de Figueiredo MOREIRA NETO, "Constituição e revisão: temas de direito político e constitucional" (Rio, Forense, 1991).

This matter is being extensively dealt with in Brazil, such as e.g., José CRETELLA Jr., "Comentários à Constituição de 1988" (S.Paulo, Forense Univ., 9 vols., 1993).

Specifically in connection with constitutional reform and economic integration, see my paper, in the seminar "Revisão constitucional e MERCOSUL", dealing with "Integração econômica e harmonização jurídica" (in prep.), as well as Luiz Olavo BAPTISTA, "O impacto do MERCOSUL sobre a legislação" (Rev. da Indústria, new series. 1.1992, pp. 144/157).

- (30) Vicente MAROTTA RANGEL, "Solução pacífica de controvérsias no MERCOSUL: estudo preliminar" (Lecture held at the ILAM, S.Paulo, June 1993; in printing; quoted hereinafter).
- (31) Lord McNAIR, Q.C., "The general principles of law recognized by civilized nations" (BYIL, 33.1957, pp. 1/19); Francis A. MANN, "Reflections on a Commercial Law of Nations" (BYIL, 33.1957, pp. 20/51).
- (32) V. MAROTTA RANGEL (paper quoted above, 1993, pp. 6/7).
- (33) Eduardo JIMENEZ DE ARECHAGA and Filipe PAOLILLO, "Contralor de la legalidad de los actos comunitarios: interpretación unitaria del derecho de integración - proyectos y posibilidades en la ALALC" (Der. de la Integración, no. 1, Oct. 1967, pp. 10/31); Maurice LAGRANGE, "La interpretación unitaria del derecho de las Comunidades Europeas: aspecto de la acción prejudicial" (Der. de la Integración, no. 3, Oct. 1968, pp. 59/80), etc.; Eberhard GRABITZ, "As fontes do direito comunitário: os atos das instituições comunitárias" (in Trinta anos de direito comunitário, op. cit., Luxembourg, SPOCE, 1984, pp. 87/114); Jean MISCHO, "Un rôle nouveau pour la Cour de Justice?" (RMC, 33.1990, no. 342, 681/686).
- (34) Some references have already been made in connection with the European Community. Extensive references would be redundant.

In the case of the Andean Pact, see, i.a.: Robert KOVAR, "Le groupe andin: une expérience d'intégration économique entre États en voie de développement" (Misc. W.J. GANSHOF van der MEERSCH, op. cit., Bruxelles, 1972, vol. II, pp. 203/223); Francisco ORREGO-VICUNA, "La création d'une Cour de Justice dans le Groupe Andin" (CDE, 10.1974, nos. 1-2, pp. 127/148); Massimo PANEBIANCO, "O Grupo subregional Andino" (RIL, 21.1984, no. 81, special issue, pp. 93/110); Antonio LINARES, "El Tribunal de Justicia del Acuerdo de Cartagena" (AADI, II.1984/86, pp. 53/63); Galo PICO MATILLA, "Derecho Andino" (Quito, Tribunal de Justicia del Acuerdo de Cartagena, 2nd. ed., 1992).

- (35) Martin HEIDEGGER, *Holzwege* (Frankfurt a/M, Vittorio Klostermann Verl., (c) 1950, 6. durchgesehene Aufl., 1980):
- "Holz lautet ein alter Name für Wald. Im Holz sind Wege, die meist verwachsen jäh im Unbegangenen aufhören. Sie heißen Holzwege. Jeder verläuft gesondert, aber im selben Wald. Oft scheint es, als gleiche einer dem anderen. Doch es scheint nur so. Holzmacher und Waldhütter kennen die Wege. Sie wissen, was es heißt, auf einem Holzweg zu sein."
- (36) Arthur Henry ROBERTSON, "The Council of Europe: its structure, functions and achievements" (London, Stevens & Sons Ltd., 1956); "Legal problems of European Integration" (RCADI, 1957-I, vol. 91, pp. 105/211); "European Institutions - Co-operation: Integration: Unification" (London, Stevens & Sons Ltd., 1959), as well as in articles and notes such as: "The European Political Community" (BYIL, 29.1952, pp. 383/401); "The Council of Europe as an organ of inter-governmental co-operation" (in *Les Institutions Internationales Européennes*, Univ. of Strasbourg, 1952); "Different approaches to European Unity" (AJCL, 1954); "The creation of Western European Union" (Eur. Yb., 2.1956).
- (37) Joseph H.H. WEILER, "The Community system: the dual character of supranationalism" (YEL, 1.1981, pp. 267/306); "Il sistema comunitario europeo: struttura giuridica e processo politico" (Bologna, Il Mulino, 1984); *The European Community in Change: Exit, Voice and Loyalty* (Saarbrücken, VRBEI, No. 109, 1987)
- (38) J. WEILER (art. cit., 1981).

- (39) A.H. ROBERTSON (op. cit., 1959).
- (40) A.H. ROBERTSON (op. cit., 1959).
"The Council of Europe is basically an organ of inter-governmental co-operation, with the addition of a parliamentary organ of a consultative character. Though its distinguishing characteristic is the existence of the Consultative Assembly, which is a parliamentary and not a governmental body, any international action of the Council must be taken by the Committee of Ministers, which is an inter-governmental organ on traditional lines". Cf. A.H. ROBERTSON, "The Council of Europe as an organ of inter-governmental co-operation" (cit., Strasbourg, 1952) as well as his "The European Political Community" (1952, p. 383, note 1).
- (41) See e.g. Max BELOFF's review of A. H. ROBERTSON's *European Institutions - Co-operation: Integration: Unification* (London, Stevens & Sons Ltd., 1959) (in BYIL, 35.1959, Oxford/ London, RIIA/OUP, 1960, pp. 286/288).
- (42) M.E. BATHURST, K.R. SIMMONDS, N. MARCH HUNNINGS, J. WELCH, eds., "Legal problems of an enlarged European Community" (London, BIICL/Stevens & Sons Ltd., 1972; British Institute Studies in International and Comparative Law, vol. 6; passim).
- (43) Lord DENNING, M.R., "The discipline of Law" (London, Butterworths, 1979, pp. 17/19; quoting his decision *BULMER Ltd. vs. BOLLINGER S/A*, 1974; 4Ch 401 at 411):
"How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or directives. It is the European way"
- (44) G. RESS, G. LÜKE & M.R. WILL, (Hrsg.), *Gedächtnisschrift für CONSTANTINESCO* (op. cit., Cologne. C. Heymann Verl., 1983; particularly the contributions

by Giovanni CRISCUOLI, "The proper gender of the Common Law", pp. 125/132; Georg LANGROD, "La comparaison en science juridique: quelques remarques concernant ses avantages et les pièges à éviter", pp. 429/437; Dominik LASOK, "The United Kingdom before the Community Court", pp. 439/455).

M.P. FURMSTON, R. KERRIDGE, B.E. SUFRIN, eds., "The effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights" (The Hague, M. Nijhoff, 1983; especially the contributions by David FELDMAN, "Influences on Judicial Reasoning", pp. 1/31; J.J. FAWCETT, "Policy considerations in the Courts in matters of jurisdiction in Conflict of Laws: the traditional English approach compared with the approach adopted by the Court of Justice of the European Communities", pp. 214/246).

For some considerations, esp. in connection with Law of Contract see CHESHIRE FIFOOT & FURMSTON's Law of Contract (London, Butterworths, 11th. ed., 1986) as well as my own "Negociação e formação de contratos internacionais - em direito francês e inglês" (Rev. FDUSP, S.Paulo, 84/85.1989/90, pp. 124/171).

- (45) Economic integration inevitably interplays with legal harmonization and unification.

These comprise an entire subject, raising many complex issues, to be dealt with separately.

Some of these aspects have been mentioned in item 10.3 "harmonização das legislações nacionais" in my Comunidade Européia e seu ordenamento jurídico (S.Paulo, 1993, in printing, pp. 771/781 as well as bibliographical references, pp. 804/809 and 847/849).

4. Final Remarks

This attempt at a comparative approach to competition law, taking as its parameters the E.C. and the MERCOSUL, has aimed to stress some common and some particular features of the two distinct integration processes. This is and is to remain within the boundaries of a lecture: meaning that both as regards the time frame as well as the contents its limits are strictly defined. Total freedom has been granted to me, concerning the choice of the subject, its approach and extension, but there should not be an abuse of such liberty. Along the way there were references to other extremely interesting and attractive topics I would be willing to discuss in further detail with you, but we should not overload today's effort. Let's try to keep it informative while also critically reasonable.

Some of the choices in either case may be interchangeable, according to requirements and specific conditions of the attempt undertaken, and these specificities are not possibly directly transposable to a different context. But the relevance of the comparative approach is to sort out what is generally valid and applicable outside the specificities of each case. This is the reason for the choice of competition law and its application by an independent, supranational Court, as a field of crucial relevance for building an internal market where free circulation of goods, persons, services and capital is completed by a comprehensive array of market regulatory guidelines.

The body of E.C. Competition Law has doubtless been effective to achieve its aims and purposes, notwithstanding conceptual shortcomings or implementation distortions which might be pointed out - this is not the point of this exercise - but as a whole, this set of principles with complementary regulations and concurrent case-law has been an effective tool for ensuring that competition within the E.C. is not distorted, turning this project into a reality.

Along a similar line of analysis we could envisage the MERCOSUL as one of many attempts at regional economic integration, undertaken within an unfavorable context, such as unimpressive historical record for former attempts and internal problems for each, especially the two largest, of the countries involved, namely Brazil and Argentina, which are not positioned to proceed, combined with the uncertainties and hesitations that have become so clear in just two years.

Therefore, notwithstanding the broad perspectives this new attempt at regional economic integration might encompass, some issues may not be neglected without jeopardizing the entire process and its eventual outcome: among them, without mentioning internal problems necessarily to be settled before any integration with a neighbouring or any country can possibly be reached, from social iniquities to bureaucratic gigantism, from abusive levels of taxation to the ensuing unavoidable phenomena of tax evasion with combined capital flight, are also the devices chosen for implementing such integration. In this sense a coherent and comprehensive body of competition law and its mechanisms for implementation may not be neglected.

The requirement of a comprehensive body of competition law and its mechanisms for implementation have not been neglected in the E.C., and has been successful for past needs and uses - needless to undertake extensive quotations in connection therewith - but now at least, no similar device is to be found in the MERCOSUL. The issue at stake is that such a lack of a comprehensive body of competition law and its mechanisms of implementation might be fatal for the implementation of the MERCOSUL.

The ways and means of attaining such a comprehensive body of competition law and its mechanisms of implementation may vary, but the basic lines of the contents are more or less clearly defined, and not subject to relevant conceptual variations: restriction of concerted practices, abuse of dominant position, dumping and state subsidies both from within, i.e., among member-states, as partners in such a venture as well as adopting protective measures to avoid the extraterritorial projections of such phenomena from the outside, as far as fair market conditions have to be preserved and may not be distorted by the unregulated action of economic agents concentrating a relevant share of markets concerned.

This matter comprises many different aspects, as far as economic and political issues are at stake, as well as legal aspects stretching along different areas of law, economic and constitutional, coupled with traditional private international and law harmonization under different appearances, thus adding to its intrinsic complexity.

From the very beginning I stated that a final word on these matters should not be expected. I hope, nevertheless, that the way these issues have been handled may spark some comparative insights and contribute to a more comprehensive view of a comprehensive body of competition law and its mechanisms of implementation not only as a specific

feature within the E.C., but as a requirement for the construction of a true "common" market, not stopping at the preliminary stages of its building, pretending to have achieved what is essential but having missed the very essence of economic integration: broader, more efficient and more competitive markets.

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Published legal articles: "A instabilidade econômica e cambial ameaça o futuro da Europa integrada" (S. Paulo, *Diário do Comércio e Indústria*, ed. 20 Nov. 1992); "Droit de la concurrence dans la CEE et le MERCOSUL: essai d'une approche comparative" (*Lettre du Brésil*, Rio, Sep. 1992, no. 165, pp. 6/7); "O desgaste do Partido Socialista e o plebiscito francês" (*Semana Internacional*, S. Paulo, *Dep. Pol. Int. & Comp.*, no. 16, 15-21 Sep. 92, p. 3); "Enfoque comparativo do direito da concorrência na CEE e no MERCOSUL" (*Atualidades Jurídicas*, CCFB, S. Paulo, no. XXXIII, 1992/6, *passim*); "Arbitragem internacional e boa-fé das partes contratantes: cláusula compromissória em contrato internacional" (*Revista dos Tribunais*, S. Paulo, 80.1991, vol. 668, Jun., pp. 239/241); "Contratos internacionais, a guerra do Golfo e a noção de hardship" (em co-autoria com J. Renato C. FREIRE; *Gazeta Mercantil*, 26 Feb. 1991, p. 5); "Negociação e formação de contratos internacionais: em direito inglês e francês" (*Rev. Fadusp*, S. Paulo, LXXXIV/LXXXV. 1989/90, pp. 124/171); "O fenômeno da franquía: da regulamentação

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Lectures: "Guerra interna e direito internacional" (in the seminar "Proteção internacional dos direitos humanos"; Institute of International Law & Relations, International Red Cross and United Nations High Commission for Refugees, S. Paulo, 12 Nov. 1992); "Legal aspects of integration and transport in the MERCOSUL" (Braz.-Argent. Chamber of Commerce, S. Paulo, 29 Oct. 1992); "O advogado brasileiro e o desafio da internacionalização na prestação de serviços" (in the seminar "O advogado na Alemanha, seu papel na sociedade e a internacionalização dos serviços"; Brazilian Bar Association, Konrad Adenauer Stiftung, German Chamber of Commerce and German General Consulate, S. Paulo, 25 Sep. 1992); "A experiência da Comunidade Européia: a solução de controvérsias e o papel do Tribunal de Justiça" (in the seminar "Integração econômica e solução de controvérsias: perspectivas do MERCOSUL", S. Paulo, 18-20 Aug. 1992); "European Competition Law and economic integration in the MERCOSUL" (S. Paulo, Mar., Apr. and Jul. 1992; German Chambers of Commerce for Asunción, Buenos Aires, Montevideo, Porto Alegre and Rio de Janeiro, Jul. 1992); "Enfoque comparativo do direito da concorrência na C.E. e no MERCOSUL" (Legal Commission CCFB, S. Paulo, 28 Apr. 1992); "O direito da concorrência na C.E. e no MERCOSUL" (in the seminar "As

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Book reviews and translations: "A Dívida Externa Brasileira: solução pela via arbitral" by J. DOLINGER (S. Paulo, Nova Fronteira, 1988) (RDCRI, 1989/1); "Ordem pública transnacional e arbitragem internacional: conteúdo e realidade da ordem pública transnacional na prática arbitral" by P. LALIVE (RDCRI, 1989/1, pp. 25/69); "Do Acto Unico à nova fronteira para a Europa" by M. C. LOPES PORTO (Coimbra, Fac. Direito, 1988) (RDCRI, 1992/3; in printing); "Direito Comunitário" by J. Mota de CAMPOS (Lisboa, Fund. C. Gulbenkian, 2nd. ed., 1988, 2 vols.) (RDCRI, 1992/3; in printing); "Aspectos jurídicos da arbitragem comercial no Brasil" by P.B. MARTINS (Rio, Lumen Juris, 1990) (RDCRI, 1992/3; in printing); "Contratos internacionais" by C.R. BASTOS & Eduardo A.G. KISS (S. Paulo, Saraiva, 1990) (RDCRI, 1992/3; in printing); "Convenção de Viena sobre relações diplomáticas" by G.E. do NASCIMENTO E SILVA (Rio/S. Paulo, Forense Univ., 1989) (RDCRI, 1992/3, in printing); reviews by the General Editor (RDCRI, "Revista das Revistas", pp. 128/129 on articles "L'investissement au Brésil" (CJFE, Paris, CFCE, 1988/3), "New tax on corporate profits faces legal challenge" and "Twelve percent interest rate constitutional provision dies an early death" (Brazil Watch, Brasília, vol. 5, 1988, nos. 23 e 25);

Other academic assignments: co-editor of Liber Amicorum I. STRENGER (with L. O. BAPTISTA & H. M. HUCK, S. Paulo, 1993; in prep.); course "Estudos europeus: direito comunitário", with Profs. M. C. Lopes PORTO, Carlos LARANJEIRO, Rui M. Moura

RAMOS, Antonio XAVIER, Manuel N. SERENS and J. Xavier BASTO, from Coimbra University Law School (with J. R. FRANCO DA FONSECA, U.S.P., S. Paulo, 19 Oct.-5 Nov. 1992); member of the Commission for International Law Prize from the International Law Institute (for the best paper prepared by an undergraduate student; 1989, 1990, 1991, 1992 and 1993); "Cooperação interamericana e integração jurídica" (legal opinion, S. Paulo, Nov. 1990; requested by the the Legal Counsel to the Ministry for Foreign Affairs, concerning execution and/or ratification of the Interamerican Private International Law Conventions (Panamá 1975 and Montevideo 1979); Member Regional Commission Deutscher Akademischer Austausch-Dienst (S. Paulo, 1993);

Member: Brazilian Bar Association; German and French Chambers of Commerce, São Paulo; Chairman, Legal Commission German-Brazilian Junior Chamber of Commerce, São Paulo; Deutsche-Brasilianische Juristen-Vereinigung, Frankfurt; English Heritage, London; Brazilian Institute of International Law and International Relations; International Law Association.